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No. _____

In the Supreme Court of the United States

GOODSPEED AIRPORT, LLC, ET AL., PETITIONERS

v.

EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION, ET AL., RESPONDENTS

GOODSPEED AIRPORT, LLC, ET AL., PETITIONERS

v.

ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the application of state and local land use regulations that interfere with aircraft flight paths and the safety of takeoffs and landings at a public use airport is preempted by the Federal Aviation Act or other provisions of federal aviation law, which provide that "the Federal Government shall have exclusive sovereignty of the airspace of the United States," including "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. §§ 40103, 40102(a)(30).

PARTIES TO THE PROCEEDINGS

In *Goodspeed Airport, LLC, et al.* v. *East Haddam Inlands Wetlands and Watercourses Commission, et al.*, petitioners are Goodspeed Airport, LLC, Timothy Mellon, and Timothy Evans. Respondents are the East Haddam Inland Wetlands and Watercourses Commission and James Ventres, the East Haddam Land Trust, and The Nature Conservancy.

In *Goodspeed Airport, LLC, et al.* v. *Rocque*, petitioners are Goodspeed Airport, LLC and Timothy Mellon. Respondents are Arthur J. Rocque, Jr., Commissioner of the Connecticut Department of Environmental Protection, the East Haddam Land Trust, and The Nature Conservancy.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Goodspeed Airport, LLC states that it has no parent corporation, and that no publicly traded company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Goodspeed Airport, LLC, Timothy Mellon, and Timothy Evans respectfully petition the Court for a writ of certiorari to review the judgments of the Supreme Court of Connecticut in these related cases.

OPINIONS BELOW

The decision of the Supreme Court of Connecticut in *Ventres* v. *Goodspeed Airport, LLC, et al.* (Pet. App. 1a-56a) is reported at 881 A.2d 937. That court's decision in *Rocque* v. *Mellon et al.* (Pet. App. 57a-66a) is reported at 881 A.2d 972. The consolidated decision of the Superior Court of Connecticut (Pet. App. 67a-97a) is not reported.

JURISDICTION

The judgments of the Supreme Court of Connecticut were entered on August 30, 2005. Pet. App. 1a, 57a. Petitioners' timely motions for reconsideration were denied on October 25, 2005. Pet. App. 98a, 100a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the U.S. Constitution provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, § 2. The relevant federal aviation statutes and regulations are reprinted at Pet. App. 102a-113a.

STATEMENT

This case presents an important issue of federal law that is vital to the safety of the nation's airways: whether the application of state land use laws to the navigable airspace surrounding an airport is preempted by provisions of

federal law that call for the removal of obstructions to air navigation and forbid interference with the routing of aircraft. This issue is critically important to the safety of the 46 million annual flights to and from the 5200 public use airports subject to federal regulation. If allowed to stand, the decisions below mean that such airports often will have to await the approval of state and local officials *before* removing trees and other objects that threaten the safety of takeoffs and landings—a situation that poses an obvious, direct threat to air safety.

This case arises out of a dispute over the removal of trees obstructing the takeoff and landing path of the Goodspeed Airport in East Haddam, Connecticut. Current FAA regulations call for removal of "obstructions to air navigation," including natural or manmade objects that exceed the height of an airport runway's "approach surface," as well as removal of items that block a "runway protection zone." 14 C.F.R. §§ 77.21(a), 77.23(a)(5); FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212. To comply with these federal regulations, petitioners removed from neighboring property trees that obstructed the navigable airspace necessary for takeoffs and landings at the airport. The state department of environmental protection and the local wetlands commission sued petitioners, claiming that their removal of those trees violated applicable land use laws. The state courts agreed, rejecting petitioners' arguments that the state land use laws were preempted.

The decisions below encroach on the federal government's ability to ensure the safety of air traffic. Moreover, the decisions below directly conflict with the holdings of two federal courts of appeals that runways and runway protection zones are part of the navigable airspace, and they highlight a general division in the lower courts about the relationship between federal regulation of the navigable airspace and state and local regulation of land use near airports. These decisions also contravene the United

States' "strong interest in assuring that its exclusive sovereignty over navigable airspace is preserved and that its comprehensive scheme of airspace management is not undermined by state[] law." Br. for *Amicus Curiae* The United States of America 6, in *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) (No. 00-2545).

In sum, review is warranted to preserve the safety of air travel, to provide clear guidance on the scope of preemption under federal aviation law, and to ensure that Congress's mandate that "the Federal Government shall have exclusive sovereignty of the airspace of the United States" (49 U.S.C. § 40103) is not undermined by applications of state and local land use regulations that affect aircraft flight patterns and jeopardize the safety of takeoffs and landings.

A. Exclusive Federal Regulation of Air Safety

Ever since the Air Commerce Act of 1926, the federal government has had "complete and exclusive national sovereignty in the air space" of the United States. *United States* v. *Causby*, 328 U.S. 256, 260 (1946) (quotations omitted). Federal regulation of the airspace is "intensive and exclusive. *** [An airport's or aircraft's] privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring).

Today, the federal interest in aviation is reflected most prominently in two statutes: the Airline Deregulation Act of 1978 ("ADA"), which provides that "a State *** may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1); and the Federal Aviation Act of 1958 (the "Act"), which created the Federal Aviation Administration ("FAA") and gave it exclusive authority to regulate the navigable airspace of the United States. As with prior law, the Act contains an express

preemption provision that recognizes the federal government's "exclusive sovereignty of the airspace of the United States." 49 U.S.C. § 40103(a). The Act further clarifies that exclusive federal regulation of the "navigable airspace" extends to regulation of the "airspace needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(30).

The Act requires the FAA's Administrator to develop plans and policies for the efficient use of navigable airspace and to ensure air safety. 49 U.S.C. § 40103(b)(1). Pursuant to this mandate, FAA regulations set standards for aircraft airworthiness and certification of personnel and airports; designate the various classes of airspace; establish air traffic routes; and govern all aspects of flight operations, including minimum and maximum altitudes. See 14 C.F.R Parts 61-67, 71, 91, and 139.

Most relevant here are the FAA's regulations governing "objects affecting navigable airspace." See 14 C.F.R. Part 77. Those regulations establish standards for determining whether objects constitute "obstructions to air navigation." 14 C.F.R. § 77.21(a). These standards apply not only to manmade objects but also to "objects of natural growth[] and terrain" at airports. *Ibid.* To protect air safety, FAA regulations call for the removal of obstructions to air navigation, whether natural or manmade. FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212.

This case concerns certain "obstructions to air navigation" near Runway 14/32 at Goodspeed Airport in East Haddam, Connecticut. An object is an "obstruction to air navigation" if it exceeds the height of either the "primary surface" or the "approach surface" of a federally regulated runway. 14 C.F.R. § 77.23(a)(5). The "primary surface" at an airport having hard-surface runways is a surface longitudinally centered on a runway and extending 200 feet beyond each end of that runway. *Id.* § 77.25(c). The primary surface for a runway such as Runway 14/32 is 250 feet wide.

Ibid. A diagram illustrating the primary surface (Appendix I) is set forth at Pet. App. 114a.

The "approach surface" is a surface "longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end." 14 C.F.R. § 77.25(d). The approach surface for a runway such as Runway 14/32 begins at the same width as the primary surface and expands uniformly to a width of 1250 feet. *Id.* § 77.25(d)(1). The approach surface extends 5000 feet horizontally at a slope of 20 to 1. *Id.* § 77.25(d)(2). Diagrams illustrating the approach surface (Appendix J) and the calculation of the 20-to-1 approach slope (Appendix K) are set forth at Pet. App. 115a-116a.

The FAA also defines a "runway protection zone," a trapezoidal area centered on the extended runway centerline. FAA Advisory Circular No. 150/5300-13, § 212a(1). The protection zone for Runway 14/32 begins 200 feet beyond the end of the area usable for takeoff and landing, at the edge of the primary surface. *Ibid.* The zone begins at the same width as the primary surface—250 feet—and widens to 450 feet over a distance of 1000 feet. See FAA Advisory Circular No. 150/5300-13, Table 2-4.

Most important for present purposes, federal regulations call for the removal of objects of natural growth, such as trees, that obstruct air navigation by penetrating the primary surface or the approach surface, and objects that are incompatible with the function of the runway protection zone. See FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212. Moreover, the FAA specifically forbids forestry activities in the runway protection zone, on account of the danger to air safety posed by trees. *Id.* § 212a(2). As explained below, applications of land use regulations that interfere with an airport's removal of trees that obstruct air navigation or the runway protection zone are preempted by

the Act, which grants the federal government exclusive control over the navigable airspace, and by the ADA, which prohibits the "enforce[ment]" of any state law or regulation that "relates to" the "routes" of air carriers.

B. Goodspeed Airport and Maintenance of Runway 14/32

Petitioner Timothy Mellon owns Goodspeed Airport, which is "open to the general public with or without a prior request to use the airport," and thus is subject to FAA regulation as an "airport available for public use." 14 C.F.R. § 77.2; Pet. App. 3a. The Airport has a single hard-surface runway that extends from northwest to southeast for about 2100 feet. This runway, Runway 14/32, is classified as a "utility runway" under FAA regulations. 14 C.F.R. § 77.2.

Goodspeed Airport has been in operation since the mid-1960s. To keep the runway's "approach surface" and the "runway protection zone" free from obstructions, Mellon and his predecessors from time to time have entered adjacent properties to remove or cut back trees that obstruct the flight path of aircraft that use the Airport. Pet. App. 17a. Trees growing on properties located just south of the Airport have posed the most serious problem.

The centerline of a tidal creek feeding the nearby Connecticut River forms the southern boundary of the Airport and the northern boundary of property owned by the East Haddam Land Trust (the "Land Trust"). Just south of the Land Trust property lies a small piece of property owned by The Nature Conservancy (the "Conservancy"), and just south of the Conservancy property is a pond known as Chapman's Pond. The distance from the end of Runway 14/32 to the southern boundary of the Airport property is 630 feet. The distance from that boundary to the southern boundary of the Land Trust property is 335 feet. And the distance from that boundary to the southern boundary of the Conservancy property (where it abuts Chapman's Pond) is 100 feet. Pet. App. 3a-4a. The total

distance from the end of Runway 14/32 to Chapman's Pond is therefore 1065 feet. Thus, the Airport's runway protection zone—which ends 1200 feet from the end of the runway—extends across the Land Trust and Conservancy properties.[1]

The critical importance of keeping Goodspeed's runway protection zone clear of obstructions was demonstrated in 1991—prior to Mellon's purchase of the Airport—when a small plane lost power shortly after taking off from Runway 14/32, but could not land in the runway protection zone because it was covered by trees. See Trial Tr. (Mar. 4, 2004) at 155. The pilot was forced to land in Chapman's Pond. The impact bent one of the plane's wings, which pinned the door shut, and the pilot and his passengers drowned. *Ibid.*

Trees growing on the properties south of the Airport continued to pose safety risks throughout the 1990s. In 1999, the year before this dispute arose, an inspector from the Connecticut Department of Transportation directed petitioners to remove a line of trees that were "obstructions to air navigation" under FAA regulations. See Commission App. A68-A85.[2] According to the inspector's report, the heights of these trees resulted in a 7-to-1 ratio for the approach surface, while "[p]er FAA's Part 77 [regulations], the minimum approach slope for this runway should be 20:1." *Id.* at A69. Petitioners complied with the inspector's mandate and eliminated the encroaching trees. Goodspeed Reply App. A19.

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[1] For an aerial view of Goodspeed Airport and nearby properties, see http://www.airstripamerica.com/cgi-bin/apt_info?42B and http://www.shoreline-aerial.com/examples/tours.htm.

[2] "Commission App." refers to the appendix to the initial brief filed by the Commission in *East Haddam Inland Wetlands and Watercourse Commission* v. *Goodspeed Airport, LLC* in the court below. "Goodspeed App." refers to the appendix to the initial brief filed by petitioners in that case, and "Goodspeed Reply App." refers to the appendix to their reply brief.

By late 2000, trees on the Land Trust and Conservancy properties continued to threaten the safety of takeoffs and landings at the Airport. In response to this hazard, Mellon directed petitioner Timothy Evans, an independent contractor who later became the Airport's manager, to enter those properties and remove the trees. Pet. App. 4a.

Forestry experts determined that of the 340 trees that Evans removed, at least half were more than 35 feet tall, and at least one tree was more than 70 feet tall. Pet. App. 4a. A large number of the trees therefore exceeded the height of the "approach surface" of Runway 14/32—which has "an elevation of 21.5 feet at the point where the airport property abuts the land trust's property but only approximately thirty-eight feet at the point where the land trust's property abuts the conservancy's property." *Id.* at 10a. Moreover, all the removed trees were located in Runway 14/32's "runway protection zone," which stretches across the Land Trust and Conservancy properties at ground level.

C. The Commission's Order and Regulations

The 2.5 acres that petitioners cleared lie within an area regulated by respondents, the East Haddam Inland Wetlands and Watercourses Commission (the "Commission") and its enforcement officer, James Ventres. Pet. App. 4a. In January 2001, the Commission issued an order directing petitioners to "[c]ease and [d]esist from all regulated activity within seventy-five feet of inland/wetlands and watercourses (regulated areas) on your property * * * and adjoining properties." Commission App. A28.

The Commission charged that petitioners had violated its local land use regulations by "conductir g a regulated activity within 75 feet of a regulated area"—"specifically, clear cutting of a flood plain forest * * * without obtaining proper permits or determination from the Wetlands

Commission." *Id.* at A29.[3] Because the Airport itself lies within a "regulated area" under the Commission's regulations, the order prohibited petitioners from clearing any vegetation, including trees, on the *Airport* property as well as the Land Trust and Conservancy properties.

D. Proceedings in the Trial Court

In March 2003, the Commission filed suit against petitioners, alleging that they had violated state law and local regulations by removing trees from regulated wetlands without first obtaining a permit. The Land Trust and the Conservancy were also named as defendants because any remediation activities that might be ordered by the court would occur on their properties. They in turn filed cross-claims against petitioners, alleging trespass and certain state-law statutory violations. Pet. App. 69a.

The state Department of Environmental Protection ('DEP") filed its own lawsuit against petitioners, alleging that their removal of trees from the Land Trust and Conservancy properties constituted an unreasonable impairment of wetlands and a floodplain forest, in violation of the Connecticut Environmental Protection Act ("CEPA"). *Ibid.* The DEP's case was tried jointly with the Commission's case. Pet. App. 67a-68a.

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[3] The Commission's land use regulations (Commission App. A222-A246) provide that "[a]ny person wishing to undertake a regulated activity within a regulated area shall apply for a permit to the Commission." Regulations, Town of East Haddam Inland/Wetlands and Watercourses Comm'n, § 6.1. The regulations define a "regulated activity" as "any operation within or use of a wetland or watercourse including removal or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses." *Id.* § 2.1(j). They define a "regulated area" as any inland wetlands or watercourse. *Id.* § 2.1(k). In making its decision on a permit application, the Commission may seek comment from various local government agencies and community interest groups. *Id.* §§ 6.11 & 7.1(b).

As a defense to the claims of both the Commission and the DEP, petitioners argued that federal law preempts application of state and local land use regulations to obstruction-clearing activities required by federal law. The trial court rejected this argument, concluding that "the federal approach slope standards and the local and state wetlands provisions regulate disparate activities and are concerned with unrelated topics" that "touch only remotely and tangentially." Pet. App. 73a. Noting that "[t]he wetlands regulations contain neither prescriptions nor proscriptions regarding navigable airspace or the removal of objects therefrom," the court failed to recognize that some *applications* of state and local land use rules may interfere with the navigable airspace. *Ibid.* The trial court thus found that federal law did not preempt application of either the CEPA or the Commission's regulations to petitioners' tree removal. Pet. App. 74a.

Applying the CEPA, the court ruled that the DEP was entitled to judgment on its claim for impairment of a floodplain forest (though not the claim for impairment of the wetlands) and ordered petitioners to pay $50,000 to support an academic or government-funded research project to be identified by the DEP. *Id.* at 84a, 95a. Applying the Commission's regulations, the court ordered petitioners to pay a civil penalty of $17,500 for cutting trees in a regulated wetlands area without a permit. *Id.* at 94a. In addition, the court enjoined petitioners from engaging in any regulated activity on the Land Trust and Conservancy properties without first obtaining a permit. *Ibid.*

With respect to the trespass claim asserted by the Land Trust and the Conservancy, the court found that petitioners had a prescriptive easement to enter the properties to cut trees, but that petitioners exceeded the scope of the easement by clear-cutting trees. Pet. App. 90a-91a. The court thus entered judgment in favor of the Land Trust and the Conservancy, ordering petitioners to pay one dollar in

damages and to observe what the court viewed as the limits of their long-established easement. *Id.* at 97a.

E. Proceedings in the Connecticut Appellate Courts

Petitioners appealed the trial court's decisions to the state's intermediate appellate court. The other parties cross-appealed. Before decision, however, the Supreme Court of Connecticut transferred both appeals to itself pursuant to Conn. Gen. Stat. § 51-199(c). Pet. App. 3a, 59a.

The Supreme Court of Connecticut affirmed the trial court's ruling that petitioners had a prescriptive easement to enter the Land Trust and Conservancy properties and remove trees, but exceeded the scope of that easement by clear-cutting the area. Accordingly, the court affirmed the trial court's injunction and award of nominal damages for trespass. Pet. App. 13a.

The court further held that the finding of a trespass disposed of petitioners' preemption defense. "[B]ecause the airport defendants had no right under state property law to clear-cut the land," the court reasoned, "they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law." Pet. App. 8a. The court reached this decision while acknowledging that many of the trees at issue were over 70 feet tall and protruded into the approach surface. See *id.* at 4a (describing the height of the trees that were cut); *id.* at 10a n. 15 (explaining that the "approach surface" was 21.5 feet high at the property line between the Airport and Land Trust properties and 38 feet high at the property line between the Land Trust and Conservancy properties).

The court cited *Griggs* v. *Allegheny County*, 369 U.S. 84, 88-89 (1962), for its holdings that the "navigable airspace" under federal law "includes airspace required for planes to land and takeoff safely," and that the "interference with use and enjoyment of neighboring land *** amounts to [a] constitutional taking and entitles landowners to

compensation." Pet. App. 13a-14a. Nonetheless, the court ultimately confused the question whether petitioners had a preemptive federal obligation to keep the approach surface clear with the question whether the owners of the neighboring properties were entitled to compensation under state law for any trespass involved in fulfilling that obligation. The court thus failed to distinguish petitioners' rights vis-à-vis the Commission from its rights vis-à-vis the neighboring landowners, ruling that the trespass determination resolved the entire case. *Id.* at 8a, 27a.[4]

The court used the same reasoning to reject petitioners' preemption defense in the DEP's case. Pet. App. 61a. The court affirmed the trial court's judgment for the DEP on its floodplain-forest claim and reversed its ruling that the DEP could not prevail on its wetlands claim. *Id.* at 59a, 63a. Indeed, the court instructed the trial court on remand to render judgment for the DEP on that claim, since

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[4] In the court below, petitioners conceded that to some extent they exceeded the scope of their prescriptive easement under state law to cut trees on the Land Trust and Conservancy properties. They further conceded that to the extent that they did so, the Land Trust and Conservancy were entitled to compensation. This was evidently the basis for the court's suggestion that petitioners made a "concession" that "in the absence of any state law property right to enter the land trust defendants' properties for the purpose of trimming and cutting trees, federal law would confer no such right." Pet. App. 26a. The question whether the Land Trust and Conservancy were entitled to compensation for trespass, however, is analytically separate from the question whether federal law permits the Commission to impose permitting requirements on petitioners' federally authorized clearing activities. *Cf. Griggs*, 369 U.S. at 88-89 (holding that overflights may not be enjoined under state law even if they constitute a taking for which compensation must be paid). That is the subject of this petition, and petitioners did not concede that state law governs this issue, which was fully briefed and argued below.

petitioners' removal of trees without permission constituted an unreasonable impairment of the wetlands.[5] *Id.* at 64a.

Petitioners moved the court below to reconsider its rulings, and in particular its handling of the preemption issue, but those motions were denied on October 25, 2005. Pet. App. 98a, 100a. By orders entered November 29, 2005, the court below stayed its decisions pending the outcome of proceedings in this Court. *Id.* at 99a, 101a. On January 17, 2006, this Court extended the time for filing the petition for certiorari to and including February 22, 2006.

REASONS FOR GRANTING THE WRIT

The decisions below pose a grave threat to the safety of air travel to and from the nation's 5200 public use airports. If allowed to stand (and thereby to influence regulatory and legal decisions in Connecticut and elsewhere), these decisions mean that airport owners must leave in place trees and other "obstructions to air navigation"—objects that protrude into the flight paths of aircraft taking off or landing—while state and local officials process permit applications and hold hearings to determine whether removing such obstructions serves *local* political interests. Recent data on plane crashes involving trees that blocked flight paths confirm that this is potentially a life-and-death issue for 600,000 pilots and millions of passengers on more than 46 million flights each year. See Federal Aviation Admin., *Administrator's Fact Book* 8, 25 (Aug. 2005).

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[5] This remand does not undermine the finality of the judgment in *Rocque*. On remand, the trial court will merely enter a judgment for the DEP on its wetlands claim and determine whether the CEPA authorizes any additional relief. Pet. App. 64a-65a. Thus, "the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 480 (1975). Accordingly, the judgment in *Rocque* is final and reviewable under 28 U.S.C. § 1257(a).

Moreover, the decisions below directly conflict with the decisions of two federal courts of appeals, which have held that land use laws may *not* be applied to runway or "clear zone" modifications needed to ensure the safety of takeoffs and landings. Indeed, the lower courts are confused about the preemptive effect of federal aviation law on generally applicable laws that, while designed to address garden-variety land use issues, *in application* affect trees or other objects that obstruct the navigable airspace. In addition, the decisions below are contrary to the position of the United States, which has defended the view that preemption under the Act is so complete as to support *removal* to federal court of state trespass claims to which the Act provides a defense.

In sum, this Court's review is urgently needed to protect the millions of travelers who fly to and from the nation's public use airports, to resolve the lower-court conflict on the scope of preemption of land use laws that affect safety in the airspace, and to uphold Congress's mandate that "the Federal Government shall have exclusive sovereignty of the airspace of the United States." 49 U.S.C. § 40103.

I. The Decisions Below Involve A Recurring Issue Of Great Importance To The Safety Of Millions Of Passengers Traveling To And From The Nation's 5200 Public Use Airports.

The question whether federal law preempts applications of state and local land use regulations that affect air safety on takeoff and landing is one of vital importance to the more than 5200 public use airports regulated by the FAA. Safety is the first priority of these airports and of the air carriers that use them, which have a "duty *** to provide service with the highest possible degree of safety in the public interest." 49 U.S.C. § 44701(d)(1)(A).

Safety was also Congress's most important concern in adopting the Federal Aviation Act, which charges the Administrator of the FAA to regulate "*in a way that best tends*

to reduce or eliminate the possibility or recurrence of accidents in air transportation." *Id.* § 44701(c) (emphasis added). As then-Justice Rehnquist explained in *City of Burbank* v. *Lockheed Air Terminal, Inc.*: "The paramount substantive concerns of Congress were to regulate federally *all* aspects of air safety and, once aircraft were in 'flight,' airspace management." 411 U.S. 624, 644 (1973) (dissenting opinion) (emphasis added; citations omitted).

The decisions below undermine the safety-based policies of the FAA. As noted above, federal regulations call for the removal of "obstructions to air navigation"—objects that pierce the approach surface—as well as obstructions in the runway protection zone at public airports. These requirements are critical to minimizing the risk of harm to pilots, passengers, and people on the ground. The presence of trees and other obstructions in aircraft flight paths results not only in shortening or closing runways, but in alterations of flight paths, in difficulty maneuvering through steep approaches or, worse, in plane crashes. If the patchwork of state and local regulations that govern trees, wetlands, and land use are the final word on removal of obstructions that threaten safe takeoffs and landings, the federal interest in safe air travel will be thwarted. As the Court put it in *Lockheed*, "[t]he Federal Aviation Act requires a delicate balance between safety and efficiency and the protection of persons on the ground," and "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled." 411 U.S. at 638-639.

This concern for the safety of takeoffs and landings is not merely hypothetical. It is well known that "most accidents occur[] during takeoff and landing, despite the relatively short duration of these phases compared to the entire profile of a normal flight." See National Transportation Safety Board, *Annual Review of Aircraft*

Accident Data: U.S. General Aviation, Calendar Year 2000, at 33 (2004). What is less well known is that objects that obstruct air navigation—including trees—are one of the leading causes of air crashes and fatalities. In 2000, for example, 152 general aviation accidents and 45 fatalities were attributed to "in-flight collision[s] with objects." *Id.* at 32. Moreover, "each of the top ten chains of fatal accident occurrences included an in-flight collision with terrain or object." *Id.* at 35.

Moreover, how to deal with *trees* protruding into aircraft flight paths or obstructing runway protection zones is a major issue that public use airports routinely face. Controversies over the removal of such trees have arisen in both large urban areas and small towns, and in at least 15 States: Washington,[6] California,[7] Ohio,[8] Michigan,[9]

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[6] G. Weeks, *Judge to Port: Remove Dangerous Trees by Nov. 1*, Anacortes American (Anacortes, Wash.), Apr. 8, 2005 (state trial court ruling requiring the Port of Anacortes, Washington to remove "trees potentially endangering air traffic at the Anacortes Airport"); J. Godden, *Next Time, They'll Hire an Arborist*, Seattle Times, Feb. 2, 1994, at B1 (opposition to King County International Airport's clear-cutting of more than 50 trees that "had grown into the airport glide path in violation of FAA regulations").

[7] W. Bee, *Rancho Murieta Airport Sues Over Cutting Trees Near Runway*, Sacramento Bee, July 9, 2004, at B2 (suit by airport to remove trees that were "obstructions on the [runway's] 'approach surfaces'"); B. Lindelof, *Flight Risk Safety Concerns Are Threatening Trees at the Rancho Murieta Airport*, Sacramento Bee, Apr. 13, 2002, at B1 ("[t]o comply with FAA rules, as many as 43 of the trees will need to be removed" because the trees are obstructions).

[8] L. Warren, *Airport Files for Nearby Land*, Dayton Daily News, Jan. 10, 2003, at B1 (failure of two years of negotiations and airport's subsequent lawsuit to remove trees "in and below the airport flight path"); J. Kuehner, *Metroparks to Make Way for Planes*, Cleveland Plain Dealer, June 4, 2004, at B3 (Cleveland "was given the go-ahead to cut and trim 88 trees" so "the final leg of the new $129 million Hopkins airport runway can be used safely * * *

New York,[10] Illinois,[11] Wisconsin,[12] Rhode Island,[13] Maine,[14] Florida,[15] Virginia,[16] Massachusetts,[17] Pennsylvania,[18] South

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despite appeals from neighboring residents to reject the move or at least delay it").

[9] D. Guthrie, *Next Case: Trees vs. Runway*, Grand Rapids Press, Jan. 5, 2003, at A1 (suit by airport seeking to compel neighbors to cut down a 75-foot strip of trees blocking flight path after neighbors refused to sell property); B. Deiters, *Judge Will Settle Feud Between Couple, Airport*, Grand Rapids Press, June 12, 2004, at A3 (dispute "that pits tall trees against low-flying aircraft will be settled in court after a Tyrone Township couple continues to fight an airport's demand to cut back trees for a runway").

[10] J. Rather, *Islip Takes Off*, New York Times, Feb. 18, 2001, at 14LI (discussing neighbors' response to clearing of "noise-buffering trees" on corner of airport property as "safety measure" pursuant to FAA regulations); M. Rosenberg, *Airport Safety vs. Quakers' Serenity*, New York Times, May 2, 1993, at 13WC (discussing opposition to Westchester County Airport's removal of 10 acres of trees where "dictated by the Federal Aviation Administration's directive to provide a safer runway approach").

[11] G. Worland, *Prairie Wild Card in Airport Future*, Rockford Register Star, May 14, 2001, at 7A (discussing local airport's removal, pursuant to FAA rules, of trees that created habitat for birds and deer but blocked lines of sight from the control tower).

[12] R. LaFrombois, *Neighbors Not Happy About Downtown Airport's Tree Cutting*, Wausau Daily Herald, June 10, 2005, at 1A (opposition to removal of trees that "had to be cut down to meet Federal Aviation Administration airspace requirements").

[13] V. Watson, *Newport State Airport Gets $100,000 U.S. Grant*, Providence Journal-Bulletin, June 25, 1999, at 1C (reporting on environmental implications of tree removal; citing FAA spokesman that removal "falls in step with requirements by the FAA that airports maintain clear areas at the end of runways").

[14] S. Mack, *Pittsfield Airport Plan Hindered by Trees*, Bangor Daily News, Jan. 17, 2001 (municipal airport's effort to obtain an environmental permit to cut trees on municipal airport property).

Carolina,[19] and North Carolina.[20] The substantial conflict generated by airport tree removal confirms the importance of Congress's decision to place decisions affecting air safety beyond the reach of local political pressures and prejudices—a decision that the rulings below undermine.

It would be tragic if it took further fatalities to establish the importance of this issue. But the many reports of crashes involving trees obstructing flight paths or runway protection zones at public use airports—including the 1991

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[15] E. Backhaus, *Airport Authority Rejects $25,000 Audubon Request*, Orlando Sentinel, Mar. 7, 1998, at D12 (dispute between airport and conservation group arising from removal of trees at end of proposed runway pursuant to FAA requests based on the "safety hazard to aircraft").

[16] J. Harper, *Waiting for the Trees to Grow*, The Virginian-Pilot (Norfolk, Va.), May 23, 1996, at 12 (citing opposition to removal of "[h]undreds of trees" that "exceeded height limits set by the Federal Aviation Administration for trees standing within an airport's runway protection zone").

[17] S. Allen, *Airport Development Alarms Environmentalists*, Boston Globe, Oct. 8, 1995, at 37 (noting environmentalists' opposition to "15 Massachusetts airports * * * knocking down trees on more than 2,000 acres to create clear air space for runway approaches").

[18] N. Williams, *Milford Residents Voice Concerns on Tree Cutting, Plans for Airport*, Morning Call (Allentown, Pa.), Apr. 16, 2003, at B2 (citing environmentalists' opposition to "tree cutting and development plan launched by the airport").

[19] J. McDermott, *John's Island Trees on Chopping Block*, Post and Courier (Charleston, S.C.), Aug. 22, 1998, at A1 (discussing opposition to tree removal despite fact that under "Federal Aviation Administration safety regulations" and "guidelines, the trees pose a danger to pilots trying to land in bad weather").

[20] *UNC-CH Planning to Remove Trees*, News & Observer (Raleigh, N.C.), Oct. 15, 2005, at B6 ("UNC-Chapel Hill will cut down trees that have grown too high in the Horace Williams Airport runway approach to comply with Federal Aviation Administration rules").

crash at Goodspeed—confirm that such a possibility cannot be discounted. See also, *e.g.*, T. Richardson, *Pilot Is Injured as Plane Crashes in Marlborough*, Boston Globe, Aug. 8, 2004, at B4 (reporting on crash at airport where "large spruces near the 1,682-foot runway * * * often force pilots who are landing to make a sudden descent," and quoting a witness as saying: "It will take a fatality or something for the FAA to force people to take the trees down."); J. Tedesco, *Plane Crash Claims Rancher*, San Antonio Express-News, Jan. 19, 2002, at 1B (reporting death of pilot of plane that "crashed in a patch of trees on the edge of the airport property").

In sum, the question presented is potentially one of life-and-death significance for the 600,000 pilots and millions of passengers who take off and land at public use airports each year. This Court's review is needed to ensure their safety.

II. The Decisions Below Conflict With The Decisions Of Two Federal Courts Of Appeals And Are Contrary To The Position Of The United States.

Certiorari is also warranted because the decisions below conflict with decisions of two federal courts of appeals and are contrary to the expressed views of the United States.

A. The Decisions Below Conflict With Decisions Of The Second And Ninth Circuits.

1. The decisions below are in direct conflict with the Second Circuit's decision in *United States* v. *City of New Haven*, 496 F.2d 452, 454 (2d Cir. 1974), which held that the Federal Aviation Act preempted application of state law to a public runway's "clear zone"—another name for the "runway protection zone" at issue here.[21] That case arose

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[21] See *Richmond, Fredericksburg & Potomac R.R. Co.* v. *Metropolitan Washington Airports Auth.*, 468 S.E.2d 90, 92 (Va. 1996) (stating that "[a] clear zone" is "also called a 'runway protection zone'"); FAA Advisory Circular No. 150/5300-13, § 2 (defining the term "clear zone" by reference to the term "runway protection zone").

when the City of East Haven filed suit to prevent its neighbor, the City of New Haven, from buying property in East Haven for use as a "clear zone," claiming that New Haven failed to obtain the requisite state land use permit. The Connecticut courts enjoined the runway plan, whether it took "'the form of physical expansion *or mere maintenance of clear zones over property located in East Haven.*'" *Id.* at 453 (quoting the injunction) (emphasis added).

The United States subsequently brought suit in federal court, claiming that the state law injunction was preempted. The district court agreed,[22] and the Second Circuit affirmed, explaining that "the airspace above the East Haven land acquired by New Haven" was within the "clear zone" and thus was "part of the navigable airspace." *Id.* at 454. As the Second Circuit held, "the order of the New Haven Superior Court was directed to and conflicted squarely with the regulation of navigable airspace which Congress has reserved for exclusive federal control." *Ibid.* "East Haven cannot enforce its rights under Connecticut law by obtaining a state court injunction which infringes on federal regulation of navigable airspace." *Ibid.*

The Second Circuit's analysis stands in stark contrast to the decisions below, which held that the scope of federal preemption turned not on whether the trees that petitioners removed from the Airport's "runway protection zone" and "approach surface" penetrated the "navigable airspace," but on whether petitioners had a right, under state trespass law, to remove them without paying compensation. Pet. App. 8a. See *City of New Haven*, 496 F.2d at 454 (noting that "the legality under state law of New Haven's acquisition of the clear zone area is entirely separate from the question of the power of the state court to enjoin airport operations, whose regulation Congress has entirely preempted"). Runway

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[22] *United States* v. *City of New Haven*, 367 F. Supp. 1338, 1341 (D. Conn. 1973).

protection zones and the like are either inside or outside the exclusively federal "navigable airspace." This Court's review is needed to answer that question and definitively to resolve this conflict of authority.

2. The decisions below also conflict with the Ninth Circuit's decision in *Burbank-Glendale-Pasadena Airport Authority* v. *City of Los Angeles*, 979 F.2d 1338, 1340-1341 (9th Cir. 1992), which held that federal law preempted an ordinance that required the city land use commission's prior approval for the development of property used for takeoffs and landings. The airport had sought to extend a taxiway next to a runway to protect the safety of aircraft that were required to cross the runway and to take off in only one direction. The city defended the permit requirement as a mere exercise of its "police powers" that was necessary to prevent "incompatible development." *Id.* at 1339-1340.

The Ninth Circuit struck down the ordinance as a "direct interference with the movements and operations of aircraft[]." *Id.* at 1341. It rejected the city's argument that its regulation was merely an exercise of land use power, stating that "[t]he proper placement of taxiways and runways is critical to the safety of takeoffs and landings and essential to the efficient management of the surrounding airspace." *Ibid.* (emphasis added). Nor was the court persuaded by the argument that permitting merely *delayed* modifying the runway: "The problem with this Ordinance is that it conditions the construction and reconstruction of taxiways and runways on the prior approval of the City," the court reasoned. *Ibid.* A city "may not exercise its police power to prohibit, delay, or otherwise condition the construction of runways and taxiways at a non-city-owned airport." *Ibid.*

The Ninth Circuit's reasoning is flatly inconsistent with the decisions below. If the Ninth Circuit was correct in holding that applying land use rules to runways and taxiways at public airports amounts to regulation of the "navigable airspace," then applying such rules to "runway

protection zones" and "approach surfaces," as in this case, likewise amounts to regulation of the "navigable airspace." The court below, however, held that the scope of preemption under the federal aviation law was limited by petitioners' rights under the state law of trespass: because petitioners "had no right under state property law to clear-cut the land, they had no such right under federal law." Pet. App. 8a. As the decisions of the Ninth and Second Circuits demonstrate, this turns preemption analysis on its head. Review is warranted to resolve this conflict.

3. The conflict between the rulings below and the decisions of the Second and Ninth Circuits is representative of broad confusion about the extent to which federal aviation laws preempt applications of state and local laws that affect air safety. Two federal appeals courts have found "implied federal preemption of the entire field of aviation safety." *Abdullah* v. *American Airlines*, 181 F.3d 363, 365 (3d Cir. 1999); accord *Greene* v. *B.F. Goodrich Avionics Sys., Inc.*, 409 F.3d 784, 794-795 (6th Cir. 2005). Two other federal appeals courts have held that federal law preempts some aspects of air safety regulation. See *French* v. *Pan Am Express, Inc.*, 869 F.2d 1, 3-7 (1st Cir. 1989); *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400, 404 (7th Cir. 1974). And two more federal appeals courts have held that federal aviation law does not preempt *any* aspect of air safety. See *Cleveland* v. *Piper Aircraft Co.*, 985 F.2d 1438, 1444 (10th Cir. 1993); *In re Air Crash Disaster at John F. Kennedy Int'l Airport*, 635 F.2d 67, 74-75 (2d Cir. 1980).[23] As the Third Circuit recently

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[23] Several courts have also held that federal aviation law does not preempt application of local land use laws to airport operations. See, *e.g.*, *Hoagland* v. *Town of Clear Lake*, 415 F.3d 693, 696-699 (7th Cir. 2005); *Gustafson* v. *City of Lake Angelus*, 76 F.3d 778, 783 (6th Cir. 1996); *Condor Corp.* v. *City of St. Paul*, 912 F.2d 215, 219 (8th Cir. 1990); *In re Commercial Airfield*, 752 A.2d 13, 15 (Vt. 2000). But even these cases frequently distinguish cases such as *Burbank* and *East Haven* on the ground that "they address the FAA's control

observed in canvassing these cases, this area is characterized by "divergent authority." *Abdullah*, 181 F.3d at 372.

It is time for this Court to clear up the confusion, resolve the conflicts discussed above, and ensure that state and local land use regulations are not allowed to interfere with the clearance of "runway protection zones," "approach surfaces," or other federally-regulated areas at public airports.

B. The Decisions Below Contravene The United States' Position On Preemption.

The decisions below also contradict the United States' position in a brief recently filed in the Seventh Circuit, which outlined a broad view of preemption under the Federal Aviation Act. Brief for *Amicus Curiae* The United States of America, *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001) (No. 00-2545). *Vorhees* arose in state court, when an airport's neighbor brought suit to prevent use of the runway for takeoffs and landings that interfered with the enjoyment of his property. The complaint alleged only state law claims, but the defendants removed the action to federal court on the theory that federal regulation of aviation law "completely preempted" the plaintiff's claim. The district court allowed removal, stating that interfering with takeoffs and landings at the airport would "require the defendants to change their routes and flight patterns," and that "regulation of the patterns and flights of aircraft is solely within the sovereignty of the federal government." 96 F. Supp. 2d 820, 822-824 (N.D. Ill. 2000).

The issue on appeal was whether preemption under the Federal Aviation Act was so complete as to support removal of state trespass claims to which the Act provides a defense.

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over navigable airspace and aviation safety." See, *e.g.*, *Commercial Airfield*, 752 A.2d at 16 (distinguishing *Burbank* on the ground that it involved "safety and airspace issues," because "the runway expansion would improve safety").

The United States filed a brief in support of affirmance. Citing the Federal Aviation Act, the brief began by explaining that "[t]he United States has a strong interest in assuring that its exclusive sovereignty over navigable airspace is preserved and that its comprehensive scheme of airspace management is not undermined by state[] law." U.S. Br. 6. It went on to state that "[t]he usual presumption against finding preemption of state law does not apply where, as here, the 'State regulates in an area where there has been a history of significant federal presence.'" *Id.* at 10 n. 5 (quoting *United States* v. *Locke*, 530 U.S. 89, 108 (2000)).

On the merits, the United States argued that "the district court correctly ruled that the FAA preempts plaintiff's law suit." U.S. Br. 8. It acknowledged that the relief sought by the plaintiff was "formally directed at the use of an airport *runway*," but explained that "'the purpose *and indeed the effect*' of the injunction would be 'to exclude physically aircraft *from the airspace* superadjacent to his lands.'" *Id.* at 11 (emphasis added). Noting that "all nine members of the Court [in *Lockheed*] agreed that Congress intended to preempt states from regulating aircraft in flight," the brief contended that "States may not manage the airspace," because such regulation "would seriously interfere with public air travel and undermine the exclusive regulatory scheme." *Id.* at 10, 12.

The decisions below are directly contrary to this reasoning. Like the state law at issue in *Vorhees*, the CEPA and the Commission's regulations at issue here are not "formally directed at" takeoffs, landings, or the clear zone extending from a public airport's runway. But like the state law at issue in *Vorhees*, the "*effect*" of these land use regulations is to prevent the removal of trees that interfere with the ability of aircraft to navigate through "the airspace superadjacent to [airport] lands." As the United States recognizes, state law need not target the airspace to interfere with air safety—and in particular the safety of takeoffs and

landings. If state law is applied so as to interfere with the airspace, it is preempted to that extent.

A divided panel in *Vorhees* held that preemption under the Act is not complete—that is, it did not support removal of the plaintiff's case—but acknowledged that his state law claim was almost certainly preempted. "Most issues of airflight and navigable airspace, probably including take-offs and landings, are within the sovereign regulatory powers of the federal government," the court explained, and "it would be difficult at best to convince a state court that the claim about trespass to airspace * * * would not interfere with the federal regulatory apparatus." 272 F.3d at 405. The dissent went even further, expressly adopting the position of the United States, quoting its brief at length, and concluding: "Were flight not completely preempted but left to all the state courts across this country, air transportation could only be chaotic and dangerous. *Runway use cannot be viewed separately. Runways cannot be used for takeoffs and landings without affecting flight patterns.*" *Id.* at 406 (H. Wood, J., dissenting) (emphasis added).

The decisions below are thus in tension with the majority and dissenting views in *Vorhees*, and with the position advanced there by the United States—which itself confirms the importance of broad federal preemption to the safety of the nation's airways. *Vorhees* also illustrates the confusion among lower court judges on the scope of preemption under the Federal Aviation Act, which provides additional reason for this Court's review.

III. The Decisions Below Are Inconsistent With The Federal Aviation Act, The Airline Deregulation Act, And This Court's Preemption Doctrine.

Review is also warranted to correct the lower court's serious misunderstanding of the scope of preemption under the Federal Aviation and Airline Deregulation Acts. Congress may preempt state law expressly or by

establishing a regime of pervasive federal regulation that occupies a particular field. See *English* v. *General Elec. Co.*, 496 U.S. 72, 78 (1990). In addition, federal law preempts state law where there is a conflict between the two, either because it is impossible to comply with both federal and state law, *ibid.*, or because the requirements of state law "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

These "categories of preemption," however, are not "rigidly distinct," *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 373 n. 6 (2000), and the ultimate question is one of congressional intent, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Here, it is clear that Congress intended to preempt applications of land use regulations that interfere with the safety of the navigable airspace—whether the case is viewed through the lens of express or implied preemption.

A. Express Preemption

To begin with, the Federal Aviation Act expressly grants the FAA "*exclusive* sovereignty" over the navigable airspace, "including *the airspace necessary for safe takeoffs and landings.*" 49 U.S.C. §§ 40103, 40102(a)(30) (emphasis added). The land use regulations at issue here directly apply to—and interfere with—the removal of trees in "the airspace necessary for safe takeoffs and landings." Thus, they are preempted.

To be sure, just as many FAA rules involve no issue of land use (*e.g.*, airspace classifications), many applications of land use laws to public airports (*e.g.*, parking rules) present no issue involving airspace safety—and thus no preemption issue. But this case falls between these two categories: it involves state and local regulations that protect objects (trees) that threaten aviation safety when they transgress the "approach surface" or "runway protection zone" of a public use airport.

Where applications of land use regulations *do* interfere with aviation safety, moreover, state and local officials may not hide behind labels such as "land use" to shield those regulations from preemption. And here, the navigable airspace clearly includes "the airspace needed to ensure safety in the takeoff and landing of aircraft." Indeed, even the dissent in *Lockheed* noted the difference between "control 'over the ground space' of airports," which is not typically preempted, and "regulating aircraft in flight," which "Congress clearly intended to pre-empt the States from regulating." 411 U.S. at 644 (Rehnquist, J., dissenting). Where trees block federally regulated runway and approach areas, they affect "aircraft in flight." The court below thus erred in concluding that local rules preventing removal of such trees are not preempted under the Federal Aviation Act.

Similarly, the Airline Deregulation Act expressly bars States and localities from "*enforc[ing]*" any "regulation" that is "*related to* a *** *route* of an air carrier." 49 U.S.C. § 41713(b)(1). As this Court explained in *Morales*, the phrase "relating to" has "a broad pre-emptive purpose" and an "expansive sweep." 504 U.S. at 383, 384. For a state law to "relate to" the route of an air carrier, the law and the route need only "have a "connection," or "stand in some relation" to, or "have bearing" on, one another. *Id.* at 383 (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)).

The land use laws at issue here plainly have a "bearing" on, "connection with," or "relation" to the "route of an air carrier." The direct effect of the regulations is to require carriers that use Goodspeed Airport to adjust their routes, either by using another airport entirely or by adopting a much steeper approach path to Runway 14/32.[24] In holding

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[24] "When an approach slope is steeper than the twenty to one ratio required by Federal Aviation Administration regulations *** the permissible landing point is shifted from the end of the runway to

that preemption here is limited by the scope of petitioners' state law property rights, the court below failed to accord proper respect to the broad scope of ADA preemption.

B. Implied Preemption

Congress's intent to displace applications of state and local land use laws to the navigable airspace is shown not only by these express preemption provisions, but also by implication from the pervasive scheme of federal regulation of the airspace and air safety.

Federal law regulates a broad range of air safety issues. The Federal Aviation Act specifically charges the FAA to regulate "in a way that best tends to reduce or eliminate the possibility or recurrence of accidents" (49 U.S.C. § 44701(c)), and it charges air carriers "to provide service with the highest possible degree of safety" (*id.* § 44701(d)(1)(A)). Pursuant to its statutory mandate, the FAA regulates pilot and flight instructor qualifications; aircraft mechanics and repairmen; airspace classification; flight rules, including minimum safe altitudes; and, importantly, "objects affecting navigable airspace." See 14 C.F.R. Part 77; *id.* Parts 61, 65, 71, 91.

In short, federal regulation of airspace and air safety is comprehensive. As Justice Jackson once observed:

> Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hand of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a

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a point [farther down the runway] where the twenty to one approach slope is achieved." Pet. App. 17a n. 22. The evidence demonstrates, however, that such a "displaced threshold," which effectively shortens the usable portion of a runway, jeopardizes air safety on landing, especially at airports having relatively short runways. See Trial Tr. (Mar. 4, 2004) at 146-147, 149-150.

> runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state governments.

Northwest Airlines, 322 U.S. at 303.

Application of the CEPA and the Commission's regulations is preempted because it conflicts with this comprehensive scheme of federal regulations that ensure air safety on takeoff and landing. To begin with, it is simply not possible for Goodspeed Airport to comply fully with *both* the FAA's obstruction-clearance rules *and* the land use regulations at issue here. Federal regulations require keeping the "approach surface" and "runway protection zone" clear of obstructions, including trees. See 14 C.F.R. §§ 77.21(a), 77.23(a)(5); FAA Advisory Circular No. 150/5300-13, §§ 211a(6), 212. By contrast, the Commission's cease-and-desist order forbids petitioners from engaging in any "regulated activity" such as tree removal within 75 feet of any "regulated area"—which includes both the Airport's property and the neighboring properties—without a permit. Petitioners' compliance with federal law is thus dependent on a local permitting decision that necessarily delays, and may outright deny, their ability to make Runway 14/32 safe for landing. That is a textbook example of conflict preemption. See *Burbank*, 979 F.2d at 1341.

At a minimum, application of CEPA and the Commission's regulations frustrates the "full purposes and objectives of Congress" in adopting the Federal Aviation Act. See *Hines*, 312 U.S. at 67. The Act establishes a comprehensive scheme for regulating the airspace—including the airspace necessary to ensure safe takeoffs and landings—and "[t]he Congressional purpose is clear[:] to

empower the [FAA] to make rules as to safe altitudes of flight at any elevation"—and thus to prevent collisions. *Allegheny Airlines, Inc.* v. *Village of Cedarhurst*, 238 F.2d 812, 815 (2d Cir. 1956). Pursuant to its statutory mandate, the FAA determines what objects constitute "obstructions to air navigation" and requires clearance of the spaces necessary for takeoffs and landings. By vesting in the DEP or the Commission the final authority to decide what conditions are necessary to ensure safe takeoffs and landings at Goodspeed Airport, the land use regulations at issue here "interfere[] with the methods by which the federal statute was designed to reach [its] goal." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987).

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In summary, this Court should review the decisions below to establish definitively the supremacy of federal regulation of the navigable airspace, including the airspace necessary for safe takeoffs and landings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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FEBRUARY 2006

APPENDIX

APPENDIX A

SUPREME COURT OF CONNECTICUT

James VENTRES et al.
v.
GOODSPEED AIRPORT, LLC, et al.
No. 17280.

Argued Apr. 14, 2005.
Decided Aug. 30, 2005.

John R. Bashaw, New Haven, for the appellants-appellees (named defendant et al.).

Michael J. Donnelly, Hartford, for the appellees-appellants (defendant the Nature Conservancy et al.).

Mark K. Branse, Glastonbury, with whom was John J. Radshaw III, Hartford, for the appellees-appellants (plaintiffs).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js.

SULLIVAN, C.J.

This appeal arises out of a complaint filed by the plaintiffs, the inland wetlands and watercourses commission (commission) of the town of East Haddam (town) and its enforcement officer, James Ventres, against the defendants, Timothy Mellon, Goodspeed Airport, LLC (airport), Timothy Evans, the East Haddam Land Trust (land trust) and the Nature Conservancy (conservancy). The plaintiffs alleged that Mellon, Evans and the airport (collectively, airport defendants) violated the town's inland wetlands regulations by failing to obtain a permit before cutting down trees and other vegetation on two properties owned, respectively, by the land trust and the conservancy

(collectively, land trust defendants).[1] The land trust defendants filed a cross claim against the airport defendants claiming, inter alia, that they had: (1) trespassed on their land and converted their trees; (2) violated General Statutes § 22a-16 of the Connecticut Environmental Protection Act;[2] and (3) violated the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On the motion of the airport defendants, the trial court struck the CUTPA cross claim. Thereafter, the matter was tried to the court,[3]

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[1] The plaintiffs alleged in the second count of the complaint that the airport defendants wilfully had violated the town's inland wetlands regulations. The trial court subsequently dismissed the second count of the complaint and the plaintiffs have not challenged that ruling on appeal.

[2] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

[3] The case was tried jointly with an action brought by Arthur J. Rocque, the commissioner of environmental protection, against Mellon, the airport, the land trust and the conservancy. The trial court's ruling in that case is the subject of the airport defendants'

which rendered judgment for the plaintiffs. With respect to the cross claims, the court concluded that the airport defendants had a prescriptive easement to enter the land in order to trim or cut trees that interfered with air traffic, but that the airport defendants' conduct had unreasonably expanded or intensified the easement. Accordingly, the trial court rendered judgment against the airport defendants on the trespass cross claim. The trial court rendered judgment for the airport defendants on the cross claim for conversion and for the land trust defendants on the cross claim pursuant to § 22a-16. The airport defendants appealed[4] from the trial court's judgment and the plaintiffs and the land trust defendants cross appealed. We affirm the judgment of the trial court.

The record reveals the following relevant facts and procedural history. The airport is located on Lumberyard Road in East Haddam. It is an "[a]irport available for public use" within the meaning of title 14 of the Code of Federal Regulations, § 77.2.[5] Mellon is the sole member of Goodspeed Airport, LLC. Evans is an independent contractor who has been the manager of the airport since November, 2003, and is responsible for managing its day-to-day activities.

The airport's southern boundary lies approximately along the centerline of a tidal creek that flows in a westerly direction into the Connecticut River. That boundary forms

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appeal in the companion case of *Rocque v. Mellon*, at 275 Conn. 161, 881 A.2d 972 (2005).

[4] The airport defendants appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

[5] Title 14 of the Code of Federal Regulations, § 77.2, defines an "[a]irport available for public use" as "an airport that is open to the general public with or without a prior request to use the airport."

the northern boundary of property owned by the land trust, which extends for approximately 335 feet to the south, where it abuts property owned by the conservancy. The conservancy's property extends for another 100 feet to the south, at which point it abuts Chapman Pond. The airport has a 2100 foot runway that runs in a north-south direction. The southern end of the runway is approximately 630 feet north of the airport's southern boundary and 1100 feet north of Chapman Pond.

Between November 29 and December 5, 2000, Evans, at the direction of Mellon and without the permission of the land trust defendants, cut down all of the trees, bushes and woody vegetation on approximately 2.5 acres of land located between the southern boundary of the airport property and Chapman Pond. Approximately 340 trees were destroyed, including some that were 100 years old and seventy-two feet high. The airport defendants claim that the trees and vegetation posed a danger to aircraft landing at and taking off from the runway. The 2.5 acres were entirely within a regulated wetlands area as defined by General Statutes § 22a-38 (15)[6] and were part of a wildlife refuge and nature preserve that extends along the Connecticut River.

Thereafter, the plaintiffs brought this action alleging that the airport defendants had failed to obtain from the commission a permit to conduct a regulated activity[7] within

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[6] General Statutes § 22a-38 (15) defines " '[w]etlands' " as "land, including submerged land, not regulated pursuant to sections 22a-28 to 22a-35, inclusive, which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture . . . ."

[7] General Statutes § 22a-38 (13) defines " '[r]egulated activity' " as "any operation within or use of a wetland or watercourse involving removal or deposition of material, or any obstruction,

a wetlands area as required by General Statutes § 22a-42a(c)(1)[8] and the town's inland wetlands regulations.[9] The airport defendants raised numerous special defenses to the plaintiffs' complaint, including a claim that the federal aviation law preempts local wetlands regulations. The land trust defendants brought cross claims against the airport defendants alleging, inter alia, that they had violated CUTPA, trespassed on their land and converted their trees, and that they had caused "unreasonable pollution, impairment or destruction" of a natural resource of the state in violation of § 22a-16 by clear-cutting the trees. Upon the motion of the airport defendants, the trial court struck the CUTPA cross claim. After a trial to the court, the court rejected the airport defendants' special defense of preemption and rendered judgment for the plaintiffs. With respect to the land trust defendants' remaining cross claims, the court found that the airport defendants had a prescriptive easement to enter the land owned by the land trust defendants for the purpose of trimming or cutting trees that interfered with air traffic, but that clear-cutting the trees

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construction, alteration or pollution, of such wetlands or watercourses . . . ."

[8] General Statutes § 22a-42a (c)(1) provides in relevant part: "On and after the effective date of the municipal regulations promulgated pursuant to subsection (b) of this section, no regulated activity shall be conducted upon any inland wetland or watercourse without a permit. Any person proposing to conduct or cause to be conducted a regulated activity upon an inland wetland or watercourse shall file an application with the inland wetlands agency of the town or towns wherein the wetland or watercourse in question is located . . . ."

[9] The town's inland wetlands regulations were prepared in accordance with the Inland Wetlands and Watercourses Act, General Statutes § 22a-28 et seq., and are substantially similar to the statutes that they are intended to implement. For convenience, we refer to the text of the statutes.

had unreasonably exceeded and intensified the easement. Accordingly, the court rendered judgment for the land trust defendants on their trespass claim and on their claim pursuant to § 22a-16. The court found the airport defendants jointly and severally responsible for paying a civil penalty of $17,500 pursuant to General Statutes § 22a-44 (b)[10] and ordered that they contribute $50,000 to an academic or government funded research project to be identified by the department of environmental protection pursuant to General Statutes § 22a-16a(3).[11] In addition, the

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[10] General Statutes § 22a-44(b) provides in relevant part: "Any person who commits, takes part in, or assists in any violation of any provision of sections 22a-36 to 22a-45, inclusive, including regulations adopted by the commissioner and ordinances and regulations promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense . . . ."

[11] General Statutes § 22a-16a provides in relevant part: "In any action brought by the Attorney General under section 22a-16 or under any provision of this title which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant (1) to provide for the restoration of any natural resource or the investigation, remediation or mitigation of any environmental pollution on or at any real property which resource or property are unrelated to such action, (2) to provide for any other project approved by the Commissioner of Environmental Protection for the enhancement of environmental protection or conservation of natural resources, (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources, or (4) to make a financial contribution to the Special Contaminated Property Remediation and Insurance Fund established under section 22a-133t provided the total aggregate amount of all contributions to said fund under this section shall not exceed one million dollars per fiscal year . . . ."

court enjoined the airport defendants from "engaging in any regulated activity on the land south of the tidal brook without obtaining a [wetlands] permit" and from entering the land trust defendants' property without their consent, except in a manner consistent with the prescriptive easement. Finally, the court ordered the airport defendants to pay damages in the amount of $1 to the land trust defendants on the trespass claim and to pay attorney's fees to be determined by the court.

On appeal, the airport defendants claim that the trial court improperly determined that: (1) federal aviation law does not preempt state and local wetlands regulations; (2) the failure to obtain a wetlands permit can give rise to an independent action under § 22a-16; (3) the removal of vegetation is a regulated activity under § 22a-38 (13); and (4) Mellon is personally liable for cutting the trees. The plaintiffs raise as an alternate ground for affirmance that the airport defendants have not established a factual record on which a claim of preemption can be predicated. They claim on cross appeal that the trial court improperly: (1) failed to order the airport defendants to restore the land to its original condition and imposed monetary penalties that were insufficient to restore it, thereby thwarting the remedial purpose of § 22a-16; and (2) calculated the per diem monetary penalties pursuant to § 22a-44 (b). The land trust defendants claim on cross appeal that the trial court improperly: (1) found a prescriptive easement in favor of the airport; (2) struck their cross claim pursuant to § 42-110a; and (3) determined that they were not entitled under General Statutes § 52-560[12] to damages measured by the cost

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[12] General Statutes § 52-560 provides: "Any person who cuts, destroys or carries away any trees, timber or shrubbery, standing or lying on the land of another or on public land, without license of the owner, and any person who aids therein, shall pay to the party injured five times the reasonable value of any tree intended for sale or use as a Christmas tree and three times the reasonable

of replacing the trees and precluded them from introducing evidence of the replacement value.

We conclude that the trial court properly determined that the airport defendants had a prescriptive easement to maintain an approach slope over the land trust defendants' property, but that they exceeded the scope of the easement by clear-cutting the land.[13] We further conclude that, because the airport defendants had no right under state property law to clear-cut the land, they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law. With respect to the plaintiffs' claims on cross appeal, we conclude that the trial court properly determined that the airport defendants should not be required to restore the land to its original condition and properly determined the amount of monetary penalties pursuant to § 22a-16. We further conclude that the trial court properly determined the per diem monetary penalties pursuant to § 22a-44 (b). With respect to the land trust defendants' claims on cross appeal, we conclude that the trial court properly granted the airport defendants' motion to strike the CUTPA claim. We further conclude that the trial court properly determined that the replacement cost of the trees was not a proper measure of damages pursuant to § 52-560. Accordingly, we affirm the judgment of the trial court.

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value of any other tree, timber or shrubbery; but, when the court is satisfied that the defendant was guilty through mistake and believed that the tree, timber or shrubbery was growing on his land, or on the land of the person for whom he cut the tree, timber or shrubbery, it shall render judgment for no more than its reasonable value."

[13] In this opinion, we use the phrase "clear-cut" to mean cutting close to the ground all trees and vegetation on a given property.

I

We first address the airport defendants' claim that the trial court improperly determined that federal aviation law does not preempt local wetlands regulations. We conclude that we need not reach this claim because we conclude that the airport defendants had no right under state property law to clear-cut the land belonging to the land trust defendants and because the airport defendants have conceded that, in the absence of a property right, federal law would not confer such a right.

The airport defendants claim that they removed the vegetation from the land trust defendants' properties pursuant to federal regulations and guidelines governing the maintenance of unobstructed "runway protection zones"[14] and approach surfaces[15] for airports like the one in

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[14] The Federal Aviation Administration has issued an advisory circular setting forth federal standards and recommendations for airport design. See Federal Aviation Administration, Advisory Circular No. 150/5300-113 (Sept. 29, 1989). The advisory circular states that "[t]he standards and recommendations contained in this advisory circular are recommended by the Federal Aviation Administration for use in the design of civil airports." The circular recommends that airports maintain a "[r]unway protection zone"; *id.*, § 211(a)(7); from which "incompatible objects and activities" should be cleared. *Id.*, § 212(a)(1). The purpose of the runway protection zone "is to enhance the protection of people and property on the ground." *Id.*, § 212. For runways like the one in the present case, the circular recommends that the runway protection zone extend 1000 feet beyond the end of the runway and increase in width from 250 feet at the end nearest the runway to 450 feet at the far end. *Id.*, p. 19, table 2-4.

[15] The Federal Aviation Administration has issued regulations establishing "standards for determining obstructions to air navigation" that "apply to the use of navigable airspace by aircraft . . . ." 14 C.F.R. § 77.21(a). Such obstructions include "existing and proposed manmade objects, objects of natural growth, and terrain." *Id.* Title 14 of the Code of Federal

the present case. They further argue that the regulations and guidelines are designed to protect navigable airspace, [16]over which the United States has exclusive authority, and

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Regulations, § 77.23, provides that "(a) [a]n existing object . . . is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces . . . (5) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25 . . . ." Section 77.25(d) of title 14 of the Code of Federal Regulations defines the "[a]pproach surface" for the type of airport at issue in the present case as a surface that starts 200 feet from the end of the runway; 14 C.F.R. § 77.25(c) (primary surface ends 200 feet beyond end of runway); and expands uniformly from a width of 250 feet; 14 C.F.R. § 77.25(c)(1); to a width of 1250 feet at a horizontal distance of 5000 feet from the beginning of the approach surface. 14 C.F.R. § 77.25(d)(1)(i); 14 C.F.R. § 77.25(d)(2)(i). The approach surface also rises at a slope of twenty to one for a horizontal distance of 5000 feet. 14 C.F.R. § 77.25(d)(2)(i). In the present case, an approach surface with a twenty to one slope would have an elevation of approximately 21.5 feet at the point where the airport property abuts the land trust's property and approximately thirty-eight feet at the point where the land trust's property abuts the conservancy's property.

[16] Section 40102(a)(30) of title 49 of the United States Code defines "navigable airspace" as "airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft . . . ."

Title 14 of the Code of Federal Regulations, § 91.119, provides in relevant part: "Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
"(a) Anywhere. An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
"(b) Over congested areas. Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.

that, therefore, they preempt state laws that would give state or local authorities the power to prevent the removal of obstructions to air traffic in such areas.[17] The airport defendants appear to argue in their brief that, because the federal government has exclusive jurisdiction over navigable airspace, they could remove obstructions within the navigable airspace without regard to either state property law or state and local land use regulations. At oral argument before this court, however, they clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right. See *Westchester v. Greenwich*, 745 F. Supp. 951, 955 (S.D.N.Y. 1990) (federal law does not create private cause of action in favor of owner of airport to institute action against neighboring landowner whose trees are encroaching on navigable airspace); see also *Westchester v. Greenwich*, 756 F. Supp. 154, 156 (S.D.N.Y.

"(c) Over other than congested areas. An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In those cases, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure . . . ."

[17] The airport defendants point to two federal statutes that they claim preempt state and local environmental legislation as applied to their conduct in this case. Section 40103(a)(1) of title 49 of the United States Code provides: "The United States Government has exclusive sovereignty of airspace of the United States." Section 41713(b)(1) of title 49 of the United States Code provides in relevant part: "[A] State . . . [or] political subdivision of a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart."

1991) (owner of airport did not have power of eminent domain or express clearance easement and therefore could interfere with neighboring landowner's ability to grow trees only if it could establish easement by prescription or public nuisance).[18] They claim that they have acquired a prescriptive clearance easement in the land trust defendants' properties under state property law and that federal law preempts any state and local laws that otherwise might limit their easement rights.[19] The land trust defendants counter that the trial court improperly determined that the airport defendants had a prescriptive easement because: (1) the airport defendants failed to meet their burden of establishing the scope of the easement; and (2) the existence of a boundary line agreement between the predecessors in title to the airport and the land trust prevents the airport from obtaining a prescriptive easement pursuant to General Statutes § 47-38.[20] They further argue that, even if the

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[18] The Westchester case had a long subsequent history and, as we discuss later in this opinion, eventually came before this court. See *Westchester v. Greenwich*, 227 Conn. 495, 629 A.2d 1084 (1993). The District Court's conclusions that there is no private cause of action under federal law in favor of an airport owner against neighboring landowners whose trees are encroaching on navigable airspace and that an airport may interfere with a neighboring landowner's ability to grow trees only if it has acquired a property right to do so, however, have never been disturbed.

[19] Neither the trial court nor the parties characterized the easement at issue in the present case as a clearance easement. The trial court concluded, however, that the airport defendants had "acquired a prescriptive easement to go onto the 2.5 acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway." As we discuss later in this opinion, this is essentially the definition of a clearance easement.

[20] General Statutes § 47-38 provides: "The owner of land over which a right-of-way or other easement is claimed or used may give notice in writing, to the person claiming or using the

airport defendants had a prescriptive easement, state and local land use law applies to the use of the easement.

We conclude that the trial court properly determined that the airport defendants have acquired a prescriptive easement to enter the land trust defendants' property for the purpose of maintaining an approach slope to the runway. We also conclude that the trial court properly determined that the airport defendants had no right under the prescriptive easement to clear-cut the land trust defendants' property.

We first address the issue of whether the airport defendants have a prescriptive clearance easement in the land trust defendants' properties and, if so, the scope and purpose of the easement. We conclude that the trial court properly determined that the airport defendants have a prescriptive easement to maintain an approach slope over the land trust defendants' property.

The distinction between an avigation easement and a clearance easement was discussed in *United States v. Brondum*, 272 F.2d 642 (5th Cir. 1959). An avigation easement "permits free flights over the land in question. It provides not just for flights in the air as a public highway-in that sense no easement would be necessary; it provides for flights that may be so low and so frequent as to amount to a taking of the property." (Internal quotation marks omitted.) *Id.*, at 645; see also *Griggs v. Allegheny County*, 369 U.S. 84, 88-89, 82 S. Ct. 531, 7 L. Ed. 2d 585 (1962) (definition of navigable airspace in 49 U.S.C. § 40102[a][30], formerly 49 U.S.C. § 1301 [24], includes airspace required for airplanes to

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privilege, of his intention to dispute the right-of-way or other easement and to prevent the other party from acquiring the right; and the notice, being served and recorded as provided in sections 47-39 and 47-40, shall be deemed an interruption of the use and shall prevent the acquiring of a right thereto by the continuance of the use for any length of time thereafter."

land and takeoff safely, but interference with use and enjoyment of neighboring land due to low flights amounts to constitutional taking and entitles landowners to compensation). By contrast, a clearance easement provides the "right to cut trees and natural growth to a prescribed height and to remove man-made obstructions above a prescribed height." *United States v. Brondum*, supra, at 644. "The interest acquired has but one function . . . and that is to serve as the ceiling over the land in question beyond which obstructions or structures may not be allowed to extend upward into the adjacent air space." (Internal quotation marks omitted.) *Id.*, at 644-45 n. 5; see also *Melillo v. New Haven*, 249 Conn. 138, 143 n.11, 732 A.2d 133 (1999).

The status of both prescriptive avigation easements and prescriptive clearance easements is unsettled under Connecticut law. See *Westchester v. Commissioner of Transportation*, 9 F.3d 242, 245 (2d Cir. 1993), cert. denied, 511 U.S. 1107, 114 S. Ct. 2102, 128 L. Ed. 2d 664 (1994). In *Westchester v. Greenwich*, 227 Conn. 495, 498-500, 629 A.2d 1084 (1993), the plaintiff, a New York municipal corporation that owned and operated the Westchester County Airport, had initiated an action in the United States District Court for the Southern District of New York against the defendants, the town of Greenwich and several residents of the town, claiming a prescriptive avigation easement in the airspace over the defendants' properties and seeking an injunction against the defendants authorizing the plaintiff to trim or cut down trees on the properties that had penetrated the airport's flight zone. The United States Court of Appeals for the Second Circuit certified the following questions to this court: "1. Can an avigation easement be acquired by prescription in the State of Connecticut?

"2. If under Connecticut law a clearance easement is distinct from an avigation easement, can a clearance easement be acquired by prescription in the State of Connecticut?

"3. Whether conceived as incident to an avigation easement or as constituting a separate clearance easement, would a clear zone include whatever air space is necessary to use the easement?" (Internal quotation marks omitted.) *Id.*, at 497 n.2, 629 A.2d 1084. Because we concluded that, under the facts and circumstances of the case, the plaintiff could not establish a prescriptive avigation easement, we declined to answer the certified questions. *Id.*, at 502, 504, 629 A.2d 1084.

In making that determination, we recognized that, in order to establish a prescriptive avigation or clearance easement, the party claiming the easement must meet the requirements of state law that "the use be adverse. It must be such as to give a right of action in favor of the party against whom it has been exercised .... In order to prove such adverse use, the party claiming to have acquired an easement by prescription must demonstrate that the use of the property has been open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." (Citation omitted; internal quotation marks omitted.) *Id.*, at 501, 629 A.2d 1084. "A use by express or implied permission or license cannot ripen into an easement by prescription." (Internal quotation marks omitted.) *Id.* We concluded that the plaintiff could not establish that its use of the airspace gave a right of action in favor of the defendants, thereby giving rise to a prescriptive easement, because: (1) "[t]he defendants... had no right of action against the plaintiff to stop the overflights because federal law prohibits landowners from obtaining injunctive relief against aircraft using the navigable airspace of the United States"; *id.*, at 502, 629 A.2d 1084; and (2) although the defendants had a right "to seek compensation from the plaintiff for aircraft flights so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land"; (internal quotation marks omitted) *id.*, at 503, 629 A.2d 1084;

here was no evidence of such interference in the case. *Id.*, at 504, 629 A.2d 1084.

In the present case, unlike in *Westchester v. Greenwich*, supra, 227 Conn. 495, 629 A.2d 1084, it is clear that the conduct that the airport defendants claim gave rise to a prescriptive clearance easement constituted a "direct and immediate interference with the [land trust defendants'] enjoyment and use of the land" entitling them to seek compensation; (internal quotation marks omitted) *id.*, at 503, 629 A.2d 1084; and, therefore, the use was adverse. Cf. *id.*, at 504, 629 A.2d 1084 (plaintiff could not establish that it had prescriptive easement because it failed to establish that overflights had harmed defendants' trees); see also *Drennen v. Ventura*, 38 Cal. App. 3d 84, 86-87 n.2, 112 Cal. Rptr. 907 (1974) (that which may be acquired by exercise of power of eminent domain should be subject to acquisition by prescription). Accordingly, we conclude that the airport defendants' use of the land trust defendants' properties could give rise to a prescriptive clearance easement if the other requirements for a prescriptive easement are met.

There is no dispute in this case that the airport defendants' use of the land trust defendants' property was "open, visible, continuous and uninterrupted for fifteen years and made under a claim of right." (Internal quotation marks omitted.) *Westchester v. Greenwich*, supra, 227 Conn. at 501, 629 A.2d 1084. The land trust defendants claim, however, that the trial court improperly found that the airport defendants had a prescriptive easement because: (1) the airport defendants failed to meet their burden of establishing the scope of the easement; and (2) the existence of a boundary line agreement prevented the airport defendants from acquiring a prescriptive easement. We address each of those claims in turn.

A

The following additional facts are relevant to the resolution of the land trust defendants' claim that the airport defendants failed to meet their burden of establishing the scope of the easement. Arthur D'Onofrio, a previous owner of the airport, testified at trial that, between 1979 and 1999, trees located within the 2.5 acres at issue in the present case were periodically trimmed or removed. The cuttings took place approximately every four or five years. The trees usually were trimmed or removed in response to complaints from pilots that the trees were protruding into the airspace and becoming a safety hazard. D'Onofrio testified that the procedure for trimming the trees was not "very scientific. Basically, [he] sent people in there with chainsaws and they cut down whatever . . . trees they thought were in the way of the approach." Shrubs were also removed in order to provide access to the trees. The cutting area was approximately 100 to 150 feet wide and was centered on the center line of the runway. Landing area inspection reports showed that, in 1981, the runway operated with a fourteen to one approach slope;[21] in 1983, it operated with a thirteen to one approach slope; in 1984 and 1985, it operated with a nineteen to one approach slope with a displaced threshold of 340 feet;[22] in 1986, it operated with a twenty to one slope with a displaced threshold of 340 feet; in 1987 and 1988, it operated with a twenty to one slope with a

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[21] In other words, for every fourteen feet that the approach slope advanced horizontally, it rose one vertical foot.

[22] When an approach slope is steeper than the twenty to one ratio required by Federal Aviation Administration regulations; see footnote 15 of this opinion; the permissible landing point is shifted from the end of the runway to a point where the twenty to one approach slope is achieved. This point is known as a "displaced threshold." In such cases, the approach slope is calculated with reference to the displaced threshold.

displaced threshold of 150 feet; in 1993, it operated with a fourteen to one approach slope; and in 1997, it operated with a thirteen to one approach slope.

On the basis of this evidence, the trial court determined that the airport defendants had acquired a prescriptive easement to enter the land trust defendants' property to trim and cut trees growing in the 2.5 acres at issue for the purpose of removing obstacles in the runway takeoff and landing corridors. After the trial court issued its memorandum of decision, the land trust defendants filed a motion for articulation requesting that the trial court provide the precise boundaries of the easement. The trial court denied the motion, stating that "[t]he memorandum of decision specified the extent of the prescriptive easement as particularly as possible under the circumstances of this case."

The land trust defendants claim that the trial court improperly found that the airport defendants had established a prescriptive easement because the easement "must be defined in terms of height, in addition to the more traditional length and width of a pathway" and because the evidence showed that "there has been no uninterrupted fifteen year period in which the airport maintained anything resembling a consistent glide path." We disagree.

"[A] prescriptive right extends only to the portion of the servient estate actually used . . . and is circumscribed by the manner of its use . . . . A prescriptive right cannot be acquired unless the use defines its bounds with reasonable certainty." (Citations omitted.) *Kaiko v. Dolinger*, 184 Conn. 509, 510-11, 440 A.2d 198 (1981); see also *Schulz v. Syvertsen*, 219 Conn. 81, 92, 591 A.2d 804 (1991). The boundaries of a prescriptive easement need not be described by metes and bounds if the character of the land makes such precise description impossible. *McCullough v. Waterfront Park Assn.*,

Inc., 32 Conn. App. 746, 759, 630 A.2d 1372, cert. denied, 227 Conn. 933, 632 A.2d 707 (1993).[23]

The burden is on the party claiming a prescriptive easement to prove all of the elements by a preponderance of the evidence. *Schulz v. Syvertsen*, supra, 219 Conn. at 91, 591 A.2d 804. "Whether the requirements for such a right have been met in a particular case presents a question of fact for the trier of facts . . . . In such cases, the trier's determination of fact will be disturbed only in the clearest of circumstances, where its conclusion could not reasonably be reached." (Citations omitted; internal quotation marks omitted.) *Robert S. Weiss & Co. v. Mullins*, 196 Conn. 614, 618-19, 495 A.2d 1006 (1985).

The only issue in the present case is whether the vertical dimensions of the prescriptive easement claimed by the

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[23] See also *O'Brien v. Hamilton*, 15 Mass. App. 960, 962, 446 N.E.2d 730 (extent of easement gained by prescription for successive owners of dominant land must be measured by general pattern formed by adverse use), appeal denied, 389 Mass. 1102, 448 N.E.2d 767 (1983); *Alvin v. Johnson*, 245 Minn. 322, 323 n.2, 71 N.W.2d 667 (1955) (court's description of prescriptive easement as " 'width for reasonable use' " was not "so devoid of description as to be totally unenforceable"); *Silverstein v. Byers*, 114 N.M. 745, 749, 845 P.2d 839 (1992) (one-quarter mile deviation in route of roadway did not defeat claim to prescriptive easement, especially when divergence was not voluntary act of person claiming right but was due to circumstances beyond his control), *cert. denied*, 115 N.M. 60, 846 P.2d 1069 (1993); *Concerned Citizens v. Holden Beach Enterprises, Inc.*, 329 N.C. 37, 47, 404 S.E.2d 677 (1991) (deviations in line of travel do not necessarily preclude finding of substantial identity of prescriptive easement if character of land prevents confinement of path to definite and specific line); *Community Feed Store, Inc. v. Northeastern Culvert Corp.*, 151 Vt. 152, 157, 559 A.2d 1068 (1989) ("the use under which a prescriptive easement arises determines the general outlines rather than the minute details of the interest" [emphasis in original; internal quotation marks omitted]), quoting 5 Restatement, Property § 477, comment b, (1944).

airport defendants were sufficiently defined. During the years that the approach slope was measured without a displaced threshold, it ranged from thirteen to one to fourteen to one. During the years that the approach slope was measured with reference to a displaced threshold of 340 feet, it ranged from nineteen to one to twenty to one. Our calculations show that these slopes are relatively consistent with the thirteen to one and fourteen to one approach slopes measured with reference to the end of the runway.[24]

In light of the type of use at issue, we conclude that the variations in the angle of the approach slope maintained by the airport defendants did not prevent them from acquiring a prescriptive easement. First, trees grow. It is clear, therefore, that it would be virtually impossible to maintain an absolutely uniform slope over the course of time. Second, a very localized and relatively small change in the topography of the vegetation could cause a major change in

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[24] If a 340 foot displaced threshold is used and a uniform slope of vegetation and the absence of obstacles south of the conservancy's property are assumed, a 14 to 1 approach slope becomes approximately an 18 to 1 approach slope (the distance from the end of the runway to Chapman Pond, 1100 feet, divided by 14 is 78.57 feet, the presumptive height of the approach slope at Chapman Pond; the distance from the displaced threshold to Chapman Pond, 1440 feet, divided by 78.57 is approximately 18); using the same form of calculation, a 13 to 1 approach slope becomes approximately a 17 to 1 approach slope; and a 20 to 1 approach slope with a 150 foot displaced threshold becomes approximately a 23 to 1 approach slope. Thus, over the course of 18 years, the approach slope ranged from approximately 17 to 1 with a 340 foot displaced threshold to 23 to 1 with a 340 foot displaced threshold. We recognize that this calculation is somewhat rough. It is reasonable to conclude, however, that, because the runway had an approach slope ranging from 14 to 1 to 13 to 1 both before and after the 10 years in which the approach slope was calculated in reference to a displaced threshold, the approach slope during those 10 years was not radically different.

the approach slope. For example, a sudden growth spurt in a single tree near the border between the land trust and airport properties could cause the approach slope to become much steeper in a short period of time. Third, although the angle of the approach slope changed from year to year, it appears to have stayed within a relatively narrow range centering around twenty to one with a 340 foot displaced threshold. See footnote 24 of this opinion. Finally, although D'Onofrio testified that he would both trim and cut down trees that protruded into the airspace, the purpose of the easement was to maintain a maximum tree height over the land, not to eliminate the trees altogether, and that was the actual result of the airport defendants' use of the property. See *United States v. Brondum*, supra, 272 F.2d at 644-45 n.5. Accordingly, we conclude that the cutting of a tree when the trimming of the tree would have been sufficient to maintain the ceiling was a deviation from the easement and neither destroyed it nor created a prescriptive right to cut trees to the ground when trimming them would suffice. See footnote 23 of this opinion; cf. *Kuras v. Kope*, 205 Conn. 332, 341, 533 A.2d 1202 (1987) ("[t]he use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit" [internal quotation marks omitted]). In summary, we conclude that the trial court's determination that the dimensions of the easement were defined with sufficient certainty to be enforceable was not clearly erroneous, given the nature of the claimed prescriptive easement.

B

We next address the land trust defendants' claims that the trial court improperly determined that the airport defendants had acquired a prescriptive easement in their properties because the existence of a boundary line agreement between the predecessors in title to the airport

and the land trust prevented the airport from obtaining a prescriptive easement pursuant to § 47-38.[25] We disagree.

The following additional facts are relevant to our resolution of this claim. On December 3, 1970, Edward Vynalek and Dorothy Vynalek (collectively, the Vynaleks), predecessor landowners to the land trust, and William H. Bradway and Ruth E. Bradway (collectively, the Bradways), predecessor landowners to the airport, entered into a boundary line agreement. The purpose of the agreement was to resolve a dispute over the location of the boundary between their properties by making the boundary the center of the tidal creek. The agreement provided that "the said BRADWAYS do hereby remise, release, and forever QUIT-CLAIM unto the said VYNALEKS, their heirs and assigns forever, all the right, title, interest, claim and demand whatsoever as the said BRADWAYS have or ought to have in or to the lands situated generally south of said division line between the lands of the parties herein TO HAVE AND TO HOLD the said premises unto the said VYNALEKS, their heirs and assigns forever, so that the said BRADWAYS, their heirs nor any other person shall hereafter have any claim, right or title in or to the said premises, or any part thereof and they are by these presents forever barred and excluded therefrom." The trial court concluded that the agreement did not prevent the airport defendants from

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[25] The land trust defendants also point to a letter dated June 7, 1978, from the airport operator at the time to the Connecticut bureau of aeronautics. The operator stated that he was in the process of obtaining permission to remove or trim trees on the land to the south of the airport property in order to reduce the approach slope. The land trust defendants argue that this letter defeats any claim that the airport defendants trimmed and removed trees from their property under a claim of right, but they point to no evidence that the airport or its predecessors actually obtained permission to enter the land. Accordingly, we reject this claim.

acquiring a prescriptive easement in the land trust's property because, although "entering the [land trust defendants'] land may contravene the rights to exclusive possession conveyed by the boundary agreement, every prescriptive easement is similarly acquired."

The land trust defendants argue that the trial court improperly failed to recognize that the agreement constituted notice, under § 47-38, of the land trust's intention to prevent the airport defendants from acquiring a prescriptive easement. In support of this argument, they rely primarily on this court's decision in *Crandall v. Gould*, 244 Conn. 583, 711 A.2d 682 (1998). In that case, "[t]he plaintiffs . . . [owned] property located at 283 River Road in the town of Stonington. The defendants . . . [owned] property, including a [private way], that [abutted] the property owned by the plaintiffs.

"A fence was constructed along the [private way] in 1960. In 1960 . . . the defendants' [predecessor] in title, obtained a permanent injunction . . . against . . . a plaintiff in [the] action, enjoining him, his servants and agents from interfering with [the predecessor's] use and enjoyment of said right-of-way . . . ." (Internal quotation marks omitted.) *Id.*, at 585-86, 711 A.2d 682.

"In 1964, the plaintiffs removed a section of the fence. The plaintiffs used the front portion of the [private way] to the opening of the fence as a means of gaining vehicular access to their property from River Road." (Internal quotation marks omitted.) *Id.*, at 586, 711 A.2d 682. Thereafter, the plaintiffs commenced an action seeking to enjoin the defendants from interfering with their use of the private way. *Id.* The trial court concluded that, because the plaintiffs had been permanently enjoined from using the private way, they did not have a claim of right to use it and, therefore, could not establish an easement by prescription. *Id.*, at 585-86, 711 A.2d 682.

On appeal, this court agreed with the trial court that the plaintiffs had violated the permanent injunction issued by the trial court in 1960 by using the private way. *Id.*, at 589, 711 A.2d 682. We further concluded that, although the plaintiffs' use of the private way was not permissive and was made without any recognition of the defendants' rights to prevent it and, therefore, ordinarily would have established that the plaintiffs had acted under a claim of right, the existence of the permanent injunction precluded the plaintiffs from acquiring a prescriptive easement. *Id.*, at 591-93, 711 A.2d 682. In support of this conclusion, we stated that, under § 47-38, when formal notice of intent to prevent another party from acquiring an easement has been provided, no such easement may be acquired. *Id.*, at 593-94, 711 A.2d 682. We further stated that "a party that obtains a permanent injunction [against a particular use] necessarily will have served notice on the opposing party that will very nearly conform to the requirements of § 47-38 and, in fact, may be superior to that contemplated by § 47-38 . . . ." *Id.*, at 594, 711 A.2d 682.

We conclude that the present case is distinguishable from *Crandall*. In *Crandall*, the injunction issued by the trial court in 1960 had been sought and was issued for the express purpose of prohibiting the plaintiffs from using the private way as an easement. In the present case, the purpose of the boundary line agreement was to resolve a property line dispute. The language of the agreement providing that neither the "BRADWAYS, their heirs nor any other person shall hereafter have any claim, right or title in or to the [Vynaleks'] premises, or any part thereof and they are by these presents forever barred and excluded therefrom" was intended merely to recognize that the Bradways had agreed to disavow any property interest in any formerly disputed land on the Vynaleks' side of the newly agreed upon property line and that their successors would have no such interest by virtue of anything that had

occurred up to the date of the agreement. Nothing in the agreement suggests that the Vynaleks were aware of any past use or anticipated any future use, for any purpose, of the portion of their land that had not been in dispute or that they intended to forestall the acquisition of a prescriptive easement in the land. We conclude, therefore, that the trial court properly determined that the boundary line agreement did not constitute notice of intent to prevent the airport defendants from acquiring an easement under § 47-38 and, therefore, did not prevent the airport defendants from acquiring a prescriptive easement in the land trust defendants' properties.

C

We next turn our attention to the trial court's determination that the airport defendants exceeded the scope of the prescriptive easement by clear-cutting the land trust defendants' properties. We note that the airport defendants do not challenge that determination on appeal.[26]

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[26] As we have indicated, the vertical dimensions of the easement varied within a relatively narrow range centered around a twenty to one slope with a 340 foot displaced threshold. As we have also indicated, when the airport defendants clear-cut the land, some of the trees within the easement were up to seventy-two feet high. It is clear, therefore, that it was not reasonably necessary to clear-cut the trees to maintain an approach slope within the specified ranges. See *Gioielli v. Mallard Cove Condominium Assn., Inc.*, 37 Conn. App. 822, 831-32, 658 A.2d 134 (1995) ("[W]hen an easement is established by prescription, the common and ordinary use which establishes the right also limits and qualifies it. . . . The use of an easement must be reasonable and as little burdensome to the servient estate as the nature of the easement and the purpose will permit."); see also *Zhang v. Omnipoint Communications Enterprises, Inc.*, 272 Conn. 627, 637, 866 A.2d 588 (2005) ("[s]ubject to the proviso that the servitude beneficiary is not entitled to cause unreasonable damages to the servient estate, or interfere unreasonably with its enjoyment . . . the beneficiary of an easement [may] make any use of the servient estate that is

Rather, their position appears to be that once they have established any property right in the land trust defendants' lands, no matter how limited, federal law preempts all of the landowners' residual property rights and all state and local land use laws limiting those rights. As we have indicated, however, the airport defendants conceded at oral argument before this court that, in the absence of any state law property right to enter the land trust defendants' properties for the purpose of trimming and cutting trees, federal law would confer no such right. We cannot perceive why, if federal law would confer no right to enter the land trust defendants' properties in the absence of a property right to do so, federal law would trump all residual private property rights of the landowner and state as well as state and local land use laws where the airport defendants established only a limited property right. If the airport defendants had no cause of action against the land trust defendants to require them to clear-cut the land under federal law; see *Westchester v. Greenwich*, supra, 745 F. Supp. at 955; they had no right under federal law to conduct such an activity themselves. Accordingly, we conclude that, under the airport defendants' own reasoning, they had no right under federal law to clear-cut the trees in the absence of a right to do so

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reasonably necessary for the convenient enjoyment of the servitude for its intended purpose"). Moreover, if the clear-cutting had occurred during the prescriptive period, it presumably would have provoked the same reaction from the land trust defendants as it did in the present circumstances. See *McCullough v. Waterfront Park Assn., Inc.*, supra, 32 Conn. App. at 756, 630 A.2d 1372 ("[a]n unreasonable increase in burden is such a one as it is reasonable to assume would have provoked the owner of the land being used to interrupt the use had the increase occurred during the prescriptive period"). Accordingly, even if the airport defendants had challenged the trial court's determination that the clear-cutting exceeded the scope of the prescriptive easement, we would conclude that that determination was not clearly erroneous.

under state property law.[27] In light of the trial court's unchallenged determination that the airport defendants had no such property right, we conclude that we need not address their claim that, if they had such a right, federal law would preempt the application of local land use law.[28] We conclude, therefore, that in the absence of any right under state property law to clear-cut the trees, state and local laws regulating activity within wetlands and watercourses applied to the airport defendants' conduct.

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[27] It seems somewhat counterintuitive that federal aviation law might preempt state and local law governing the use of real property even though it does not preempt state property law. There is some precedent for that proposition, however. See *National Aviation v. Hayward*, 418 F. Supp. 417, 424-25 (N.D. Cal. 1976) (exercise of municipal police power to regulate aircraft noise is preempted by federal law but right of municipal proprietor of airport to determine permissible noise level is not preempted). It is implicit in *National Aviation* that, although neighboring landowners could seek compensation if airport noise interfered with the use and enjoyment of their property, if a municipal airport proprietor obtained noise easements from the landowners, state and local governments could not regulate noise levels. See *id.*, at 421. As we have indicated, however, we need not consider in the present case the extent to which the principles cited in *National Aviation* apply to privately owned airports and prescriptive clearance easements because the airport defendants have not established that they have a property right to clear-cut the land trust defendants' trees.

[28] We note that the plaintiffs do not claim that the type of activities allowed by the prescriptive easement would violate state or local land use regulations. Accordingly, we need not consider whether federal law would preempt local regulations with respect to those activities. Nor need we consider the plaintiffs' alternate ground for affirmance that, in the absence of any factual foundation that the airport defendants had initiated proceedings with the Federal Aviation Administration to identify and eliminate obstructions on the land trust defendants' property, there was no factual predicate for the airport defendants' claim of preemption.

II

We next address the airport defendants' claim that, even if we conclude that federal law did not preempt the application of state and local wetlands regulations to their conduct, the trial court improperly rendered judgment for the land trust defendants on their cross claim that cutting the trees constituted unreasonable pollution under § 22a-16 because the claim was predicated on the airport defendants' failure to obtain a permit pursuant to the Inland Wetlands and Watercourses Act (act), General Statutes § 22a-28 et seq., and, therefore, could not form the basis for a claim under § 22a-16. We disagree.

The following additional procedural history is relevant tc our resolution of this claim. In the sixth count of their cross claim against the airport defendants, the land trust defendants claimed that the clear-cutting of their land had "removed a natural buffer that existed between Chapman Pond and any [a]irport disturbances, threaten[ed] the integrity of Chapman Pond and the lower Connecticut River Watershed, and involve[d] conduct which has, or is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in Chapman Pond by increasing noise pollution and other destruction and impairment of wetlands, watercourses and other environmentally sensitive habitats in breach of the public trust. For example, the stream that these trees helped to shade and retain has a documented population of wild brook trout and the removal of the shade trees will adversely affect the stream water quality, temperature, and habitat. The trees also served to buffer Chapman Pond's breeding waterfowl and wintering bald eagle habitat from the airport." (Internal quotation marks omitted.)

The trial court found that the "clear-cutting was unreasonable under all of the circumstances. In the past, only trimming and selective cutting of trees was employed to remove such obstacles to air navigation, which the

growing trees created. There existed no sound reason to abandon that conservative practice. To sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily." Accordingly, the court rendered judgment for the land trust defendants on the sixth count of their cross claim.

The airport defendants argue that the sixth count of the land trust defendants' cross claim was duplicative of the first count of the commissioner of environmental protection's complaint in the companion case of *Rocque v. Mellon*, 275 Conn. at 161, 167-69, 881 A.2d 972 (2005), in which the commissioner alleged that the airport defendants had violated § 22a-16 by failing to obtain a permit as required by § 22a-42a (c)(1). See footnote 3 of this opinion. The trial court concluded in that case that the commissioner could not prevail on its claim because, under this court's decision in *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 138-48, 836 A.2d 414 (2003), "the failure to obtain a license or permit to engage in conduct which impinges on the environment cannot form the basis for a . . . claim under § 22a-16." The airport defendants argue that, in the present case, the trial court should have dismissed the land trust defendants' claim under § 22a-16 for the same reason. We note that, in the companion case, we reversed the trial court's dismissal of the first count of the commissioner's complaint and remanded the case with direction to render judgment in favor of the commissioner on that count. *Rocque v. Mellon*, supra, at 169-70, 881 A.2d 972. For similar reasons, we conclude in the present case that the trial court properly rendered judgment for the land trust defendants on the sixth count of their complaint.

Because the airport defendants' claim implicates the standing of the land trust defendants to raise a claim under § 22a-16, it necessarily implicates the trial court's subject matter jurisdiction over the claim. See *Connecticut Coalition*

Against Millstone v. Rocque, supra, 267 Conn. at 127-28, 836 A.2d 414. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Id.*

In *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. 116-18, 134, 836 A.2d 414, the plaintiffs, environmental activists, claimed that the Millstone Nuclear Power Generating Station should be enjoined from operating because it was functioning under an improperly issued permit. We determined that "[a]llegations of improper decisions by the commissioner for failure to comply with the statutory requirements regarding permit renewal proceedings and emergency authorizations cannot be construed as anything other than a licensing claim under [General Statutes] § 22a-430." *Id.*, at 134, 836 A.2d 414. Relying on a long series of cases in which we had held that § 22a-16 does not confer standing to litigate decisions regarding permits that are within the exclusive jurisdiction of a state agency, we concluded that the trial court properly had dismissed the plaintiffs' claims. *Id.*, at 129-38, 836 A.2d 414. In doing so, we distinguished other cases in which we had determined that the plaintiffs had standing under § 22a-16 because, although the lack of an appropriate permit had been alleged, the plaintiffs had raised independent "claims of unreasonable pollution [that] were directed primarily to the polluting activity itself, and not . . . to the validity of an existing permit or authorization . . . ." *Id.*, at 139-40, 836 A.2d 414, citing *Keeney v. Old Saybrook*, 237 Conn. 135, 140-41, 676 A.2d 795 (1996) (alleging unreasonable pollution of state waters from town's failure to comply with pollution abatement orders); *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (alleging unreasonable pollution from

failure to obtain permit for operation of solid waste facility that generated leachate, which degraded groundwater); *Keeney v. L & S Construction*, 226 Conn. 205, 209, 626 A.2d 1299 (1993) (alleging unreasonable pollution from depositing construction debris in close proximity to area water supply without permit).

In the present case, unlike in *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. at 139, 836 A.2d 414, the land trust defendants make no claim that the clear-cutting of their properties constituted unreasonable pollution because the airport defendants had failed to obtain a wetlands permit. Indeed, their cross claim makes no reference to the need for a permit at all.[29] Instead, their claim was "directed primarily to the polluting activity itself . . . ." Accordingly, we conclude that the trial court properly rejected the airport defendants' claim that the land trust defendants lacked standing to raise this cross claim.

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[29] We conclude elsewhere in this opinion that the clear-cutting constituted a regulated activity for which a permit was required. See part III of this opinion. In *Waterbury v. Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002), we held that "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under [§ 22a-16], whether the conduct is unreasonable under [§ 22a-16] will depend on whether it complies with that scheme." We need not consider, however, whether the plaintiffs would have issued a wetlands permit for clear-cutting the land if an application for a permit had been submitted because we have concluded in part I of this opinion that the airport defendants had no rights in the property that would have entitled them to submit such an application. In the absence of any such right, the airport defendants' conduct necessarily would not have been permitted. Accordingly, we conclude that the trial court properly determined that "[t]o sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily," and was, therefore, unreasonable.

III

We next address the airport defendants' claim that the trial court improperly rendered judgment for the plaintiffs on their claim that the airport defendants violated the act by failing to obtain a permit to clear-cut the land trust defendants' properties. They argue that the removal of vegetation from the properties was not a regulated activity under the act because it did not disturb any wetlands soils. We disagree.

The trial court found that "[t]he floodplain forest which was clear-cut comprised diverse species of hardwood trees and woody shrubs. . . . [A]round 340 trees and tree sprouts were severed on land trust property and a few more on conservancy land. These trees acted as a flood brake, slowing the velocity of the occasional floodwaters of the Connecticut River which regularly spill into the floodplains and eventually into Chapman's Pond. The slower the flow of floodwater, the less erosion, scouring, and damage to the submerged land and water bodies is done. The taller and denser the floodplain forest, the greater the buffering capacity to slow floodwaters. Undoubtedly, the felling of all trees and woody vegetation over 2.5 acres in the midst of a floodplain corridor between the Connecticut River and Chapman's Pond altered that wetlands and the abutting floodplains and wetlands." Accordingly, the trial court concluded that the airport defendants had violated § 22a-42a (c)(1) of the act and were liable for damages of $17,500 under § 22a-44 (b).

We first address the standard of review. "Whether the trial court properly concluded that the commission had jurisdiction over the activities proposed by the plaintiff involves a legal question involving statutory interpretation, over which our review is plenary." *AvalonBay Communities, Inc. v. Inland Wetlands Commission*, 266 Conn. 150, 158, 832 A.2d 1 (2003).

We begin with the language of the statute. General Statutes § 22a-38 (13) defines " '[r]egulated activity' " as "any operation within or use of a wetland or watercourse involving rer..oval or deposition of material, or any obstruction, construction, alteration or pollution, of such wetlands or watercourses . . . ." Thus, the definition expressly includes operations "involving removal or deposition of material" in wetlands areas. In the present case, the airport defendants removed the living vegetation canopy growing over the wetlands and deposited the woody remains on the ground.[30] If the removal of all vegetation growing in a wetlands area was not intended to be a regulated activity, we would be hard pressed to imagine what type of material the legislature had in mind in enacting § 22a-38 (13). Accordingly, we conclude that the clear-cutting was a regulated activity.

The airport defendants argue, however, that our opinion in *AvalonBay Communities, Inc. v. Inland Wetlands Commission*, supra, 266 Conn. 150, 832 A.2d 1, supports their claim that the clear-cutting of the land trust defendants' land was not a regulated activity. In that case, the plaintiff appealed to the trial court after the defendant inland wetlands commission had denied its application for an inland wetlands permit. *Id.*, at 152, 832 A.2d 1. The trial court dismissed the appeal and the plaintiff appealed to this court, claiming that the denial was improper because its

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[30] Brian Golembiewski, an environmental analyst with the inland water resources division of the bureau of water management and the department of environmental protection, appeared at trial as the plaintiffs' expert witness. He testified that, "[u]nfortunately, all of this woody material has been left in place, so even . . . where you would have sunlight and you'd have . . . herbaceous or soft-stemmed short plants that would now have sunlight that they didn't have prior . . . [that] could grow and establish, that would even be somewhat limited by this blanket of woody materials left out there."

proposed construction activities would not take place within any wetlands, watercourses or wetlands buffer area. *Id.* The defendant argued that the act was intended not only to protect the wetlands from physical damage or intrusion, but to protect wildlife and biodiversity both within and outside the borders of the wetlands. *Id.*, at 156-57, 832 A.2d 1. We noted that § 22a-38(15) defined wetlands as "land, including submerged land . . . which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain . . . ." (Emphasis in original; internal quotation marks omitted.) *Id.*, at 162, 832 A.2d 1. We determined that, although an "inland wetlands commission may regulate activities taking place outside the wetlands boundaries and upland review [buffer] areas if such activities are likely to have an impact or effect on the wetlands themselves"; *id.*, at 161, 832 A.2d 1; "the act protects [only] the physical characteristics of wetlands and watercourses and not the wildlife, including wetland obligate species, or biodiversity." *Id.*, at 163, 832 A.2d 1. Accordingly, we concluded that the plaintiff's proposed construction activities did not require the issuance of a regulated activity permit.[31] *Id.*, at 171, 832 A.2d 1.

We conclude that the airport defendants read *AvalonBay Communities, Inc.*, too broadly when they argue that

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[31] The legislature responded to our ruling in *AvalonBay Communities, Inc.*, by enacting No. 04-209 of the 2004 Public Acts, now codified at General Statutes § 22a-41 (c), which provides: "For purposes of this section, (1) 'wetlands or watercourses' includes aquatic, plant or animal life and habitats in wetlands or watercourses, and (2) 'habitats' means areas or environments in which an organism or biological population normally lives or occurs." The plaintiffs argue that this amendment is retroactive because it was intended to clarify that clear-cutting of vegetation within a wetlands is a regulated activity. We need not reach this claim because we conclude that the airport defendants conduct was a regulated activity under the version of the statute in place at the time that the activity took place.

activities that affect the vegetation growing within a wetlands but that do not disturb the soil cannot be regulated. Nothing in that case suggests that the act's definition of the term wetlands was intended to exclude vegetation growing within the wetlands, and we perceive no reason to conclude in the present case that the legislature had any such intention. In ordinary usage, the word "land" includes things growing on the land. See Black's Law Dictionary (4th Ed. Rev. 1968) (" '[l]and' includes not only the soil or earth, but also things of a permanent nature affixed thereto or found therein, [including] water, trees, grass, herbage, other natural or perennial products, growing crops or trees [and] mineral under the surface"). In any event, the trial court expressly concluded that the airport defendants' activities would result in damage to the soils themselves as a result of increased "erosion [and] scouring . . . [of] the submerged land and water bodies . . . ." That factual finding was supported by the court's finding that the land was in a floodplain and that a taller and denser vegetation cover would prevent such damage by slowing floodwaters.[32] Accordingly, we reject this claim and affirm the trial court's determination that the clear-cutting was a regulated activity.

IV

We next address the airport defendants' claim that the trial court improperly determined that Mellon was personally liable for clear-cutting the trees on the land trust defendants' property. We disagree.

The following additional procedural history is relevant to our resolution of this claim. At trial, Evans testified that Mellon instructed him to cut "everything" within the 2.5 acres. Mellon testified that he directed Evans to cut all of the trees within the approach slope. Mellon did not

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[32] That finding was, in turn, supported by the trial testimony of Brian Golembiewski, the plaintiffs' expert witness.

specifically recall instructing Evans to cut shrubs, but stated that he took "responsibility for whatever [Evans] cut," and that everything that Evans did was under Mellon's authority.

During trial, the airport defendants filed a motion to dismiss the claims against Mellon personally on the ground that the plaintiffs and the land trust defendants had not established a prima facie case that he had acted in his individual capacity and not merely as a corporate officer of the airport. The trial court denied the motion. In its memorandum of decision, the court found that, "[b]etween November 29 and December 5, 2000, at the direction of Mellon, the owner of the airport, Evans, an independent contractor, clear-cut approximately 2.5 acres of floodplain forest located on land owned by the land trust and land owned by the conservancy." The court rendered judgment against the airport defendants on the plaintiffs' claims pursuant to § 22a-44 (a) and found the airport defendants jointly and severally liable for a civil penalty of $17,500 pursuant to § 22a-44 (b). The court also rendered judgment in favor of the land trust defendants on their claim pursuant to § 22a-16 and, pursuant to § 22a-16a, ordered the airport defendants to make a financial contribution of $50,000 to "an academic or government-funded research project related to environmental protection or conservation of natural resources, which recipient will be identified by the [department of environmental protection]."

It is well established that "an officer of a corporation does not incur personal liability for its torts merely because of his official position. Where, however, an agent or officer commits or participates in the commission of a tort, whether or not he acts on behalf of his principal or corporation, he is liable to third persons injured thereby." *Scribner v. O'Brien, Inc.*, 169 Conn. 389, 404, 363 A.2d 160 (1975); see also *Kilduff v. Adams, Inc.*, 219 Conn. 314, 331-32, 593 A.2d 478 (1991) ("[i]t is black letter law that an officer of a corporation who

commits a tort is personally liable to the victim regardless of whether the corporation itself is liable"). "Thus, a director or officer who commits the tort or who directs the tortious act done, or participates or operates therein, is liable to third persons injured thereby, even though liability may also attach to the corporation for the tort." 18B Am. Jur. 2d 607, Corporations § 1629 (2004).

Because the issue of whether a corporate officer has committed or participated in the wrongful conduct of a corporation is a question of fact, it is subject to the clearly erroneous standard of review. See *Sargent v. Smith*, 272 Conn. 722, 728, 865 A.2d 1129 (2005). "[A reviewing court] cannot retry the facts or pass upon the credibility of the witnesses. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Id.*, at 728-29, 865 A.2d 1129.

We conclude in the present case that the trial court's determination that Mellon personally directed Evans to clear-cut the trees is amply supported by the record. Accordingly, we conclude that the trial court properly determined that Mellon was personally liable for cutting the trees under §§ 22a-44 (b) and 22a-16a. See *Scribner v. O'Brien, Inc.*, supra, 169 Conn. at 404, 363 A.2d 160. It is immaterial whether Mellon was acting in his individual capacity or on behalf of the corporation. See *id.*

Mellon makes two arguments in support of his claim to the contrary. First, he argues that his conduct did not fall within the responsible corporate officer doctrine adopted by this court in *BEC Corp. v. Dept. of Environmental Protection*, 256 Conn. 602, 618, 775 A.2d 928 (2001). Second, he argues that the application of *Scribner v. O'Brien, Inc.*, supra, 169 Conn. 389, 363 A.2d 160, to limited liability companies has

been superseded by General Statutes § 34-134.[33] We reject both arguments.

In *BEC Corp. v. Dept. of Environmental Protection*, supra, 256 Conn. 602, 775 A.2d 928, this court considered whether officers of the plaintiff corporation could be held personally liable under the Connecticut Water Pollution Control Act, General Statutes § 22a-416 et seq., for pollution caused by the corporation. We concluded that because General Statutes § 22a-432 defined "person" under the act to include "any officer" of a corporation; (internal quotation marks omitted) *id.*, at 617, 775 A.2d 928; and because the broad remedial purpose of the act is to "achieve clean water [despite] possible individual hardship"; (internal quotation marks omitted) *id.*, at 622, 775 A.2d 928; a corporate officer could be held personally liable for the abatement of a violation of the act when: "(1) the officer is in a position of responsibility that allows that officer to influence corporate policies and activities; (2) there is a nexus between the officer's actions or inactions in that position and the violation of § 22a-432 such that the corporate officer influenced the corporate actions that constituted the violation; and(3) the corporate officer's actions or inactions resulted in the violation." *Id.*, at 618, 775 A.2d 928. We emphasized, however, that we were "by no means establishing the responsibility of corporate officers in general with respect to corporate activity; we restrict the application of the responsible corporate officer doctrine solely to violations of the act." *Id.*

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[33] General Statutes § 34-134 provides: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company, except where the object of the proceeding is to enforce a member's or manager's right against or liability to the limited liability company or as otherwise provided in an operating agreement."

In the present case, the airport defendants argue that, because § 22a-38(2)[34] does not define "person" to include corporate officers, and because we limited the application of the responsible corporate officer doctrine to § 22a-432 in *BEC Corp.*, Mellon cannot be held personally liable. We are not persuaded. Section 22a-432 is a strict liability statute; see *Cadlerock Properties Joint Venture, L.P. v. Commissioner of Environmental Protection*, 253 Conn. 661, 670, 757 A.2d 1 (2000), cert. denied, 531 U.S. 1148, 121 S.Ct. 1089, 148 L.Ed.2d 963 (2001); and the responsible corporate officer doctrine that we adopted in *BEC Corp.* was based on a case imposing liability on corporate officers for strict liability public welfare offenses. See *BEC Corp. v. Dept. of Environmental Protection*, supra, 256 Conn. at 618, 775 A.2d 928, citing *Matter of Dougherty*, 482 N.W.2d 485, 490 (Minn. App. 1992). Moreover, the responsible corporate officer doctrine that we adopted in *BEC Corp.* did not require a finding that the officer had committed, directly participated in or directed the conduct that resulted in a violation before he could be held personally liable, but required only that the officer have a position of responsibility and influence from which he could have prevented the corporation from engaging in the conduct. We conclude, therefore, that the responsible corporate officer doctrine that we adopted in *BEC Corp.*, and any limitations on that doctrine, apply solely to a corporate officer's personal liability for strict liability public welfare offenses committed by the corporation. We did not intend to overrule or abrogate the black letter principle that a corporate officer may be held personally liable for tortious conduct in which the officer directly participated, regardless of whether the statutory basis for

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[34] General Statutes § 22a-38 (2) defines " '[p]erson' " as "any person, firm, partnership, association, corporation, limited liability company, company, organization or legal entity of any kind, including municipal corporations, governmental agencies or subdivisions thereof . . . ."

the claim expressly allows liability to be imposed on corporate officers.[35]

We next address the airport defendants' claim with respect to § 34-134. That statute provides in relevant part: "A member or manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company . . . ." General Statutes § 34-134. The airport defendants argue that this statute, which was enacted in 1993; see Public Acts 1993, No. 93-267, § 20; supersedes the principle that officers of corporations may be held personally liable for their conduct on behalf of a company in certain circumstances as that principle applies to limited liability companies. See *Scribner v. O'Brien, Inc.*, supra, 169 Conn. at 404, 363 A.2d 160. We disagree. "Although the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed." (Internal quotation marks omitted.) *Matthiessen v. Vanech*, 266 Conn. 822, 838-39, 836 A.2d 394 (2003). Section 34-134 evinces no legislative intent to eliminate the right to impose liability on a member or manager of a limited liability company who has engaged in or participated in the commission of tortious conduct. Rather, the statute merely codifies the well established principle that "an officer of a corporation does not incur personal liability for its torts *merely because of his official position.*" (Emphasis added.) *Scribner v. O'Brien, Inc.*, supra, at 404, 363 A.2d 160. Accordingly, we reject the airport defendants' arguments that the principle that corporate officers are personally responsible for their own tortious conduct does not apply in this case.

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[35] The airport defendants make no claim that a violation of § 22a-16 or § 22a-42a does not constitute tortious conduct.

V

We next address the claim of the plaintiffs on cross appeal that the trial court improperly failed to exercise its jurisdiction to order the airport defendants to restore the land trust defendants' properties to their condition prior to the violation of § 22a-44 (a) or to impose a civil penalty sufficient to fund the restoration of the properties. We disagree.

The following additional facts and procedural history are relevant to our resolution of this claim. Christopher Allan, a senior associate with Land Tech Consultants and an expert witness for the plaintiffs, testified that restoration of the properties would require planting new trees and shrubs and fencing each tree and shrub individually to protect them from deer. He estimated that the cost of the restoration would be $158,092. Sigrun Gadwa, the principal ecologist for REMA Ecological Services and an expert witness for the airport defendants, testified that Allan's plan could be implemented for a cost of at least 20 percent less.

The airport defendants began their clear-cutting operation on November 29, 2000. Thirty-five days later, on January 2, 2001, Ventres issued a cease and desist order prohibiting the airport defendants from engaging in any further regulated activity at the site.

General Statutes § 22a-44 (b) provides in relevant part that "[a]ny person who commits . . . any violation of any provision of sections 22a-36 to 22a-45, inclusive, including regulations . . . promulgated by municipalities or districts pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense. Each violation of said sections shall be a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed to be a separate and distinct offense. . . ." Pursuant to this statute, the trial court imposed a civil penalty of $500

per day for each of the thirty-five days between November 29, 2000, and January 2, 2001, for a total of $17,500. The court declined to order the airport defendants to perform any restorative work because "no party proposes a replication of the conditions which existed before the clear-cutting occurred,"[36] because "the land upon which such action would occur is owned by others" and because the court addressed the issue of restoration in connection with the land trust defendants' claims pursuant to § 22a-16. As we have indicated, the trial court ordered the airport defendants to make a financial contribution of $50,000 pursuant to § 22a-16a, which provides that "under any provision of [title 22a] which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant . . . (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources . . . ." The court stated that "[i]t is expected that the [department of environmental protection] will identify a recipient connected to the Chapman's Pond preserve, if possible."

The plaintiffs argue on appeal that trial court's decision to assess $17,500 in civil penalties and not to order the airport defendants to restore the properties was an abuse of discretion because "[t]here was simply no testimony from which the court could conclude that $17,500 was sufficient to restore" the land to the condition it was in before the clear-cutting, and because § 22a-44 (b) contemplates that

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[36] The plaintiffs' experts did not propose returning the land to the condition that it was in before the clear-cutting because, as the trial court found, "invasive species, such as ailanthus trees, had already established themselves at this site for many years, and it is highly desirable ecologically to eradicate such invaders and replace them with native species."

penalties "shall be used . . . (1) to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible . . . ." They further argue that, pursuant to General Statutes § 22a-20,[37] the $50,000 contribution ordered by the trial court pursuant to § 22a-16a (3) was supplemental to the civil penalty ordered pursuant to § 22a-44 (b), not in lieu of it, and, therefore, should not be considered in determining whether the penalty was sufficient. The airport defendants counter that the trial court reasonably found that the plaintiffs' proposed restoration plan was excessive because it did not contemplate restoring the land to its original condition, but to an improved condition. They further argue that the trial court intended the $50,000 contribution to be part of the penalty for violating § 22a-44.

"A party seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law . . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion." (Internal quotation marks omitted.) *Pequonnock Yacht Club, Inc. v. Bridgeport*, 259 Conn. 592, 598, 790 A.2d 1178 (2002).

This court has not previously had occasion to consider the scope of the trial court's discretion in ordering a civil penalty pursuant to § 22a-44 (b). Generally, in the absence of any specific guidance from the legislature,[38] a civil

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[37] General Statutes § 22a-20 provides in relevant part: "Sections 22a-14 to 22a-20, inclusive, shall be supplementary to existing administrative and regulatory procedures provided by law and in any action maintained under said sections, the court may remand the parties to such procedures . . . ."

[38] The plaintiffs argue that the trial court's discretion to impose civil penalties is limited by subdivision (1) of § 22a-44 (b), which

penalty provision vests wide discretion in the court to determine a fair and proper penalty. See *Carothers v. Capozziello*, 215 Conn. 82, 103, 574 A.2d 1268 (1990).[39]

As the airport defendants point out, the trial court determined that the restoration plan proposed by the plaintiffs' expert would not have restored the land to its prior condition, but would have improved the condition of the land. The plaintiffs have not disputed that finding. We conclude that the court was not required to create and

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provides that civil penalties imposed pursuant to that statute "shall be used solely . . . to restore the affected wetlands or watercourses to their condition prior to the violation, wherever possible . . . ." We disagree. That language merely provides that any penalties that are assessed should be used to restore the wetlands. It does not require the court to impose a penalty that is sufficient to restore the wetlands.

[39] We previously have held that, in assessing penalties under other civil penalty provisions of title 22a that provide no specific guidance to the court, the factors to be considered by the court "include, but are not limited to: (1) the size of the business involved; (2) the effect of the penalty or injunctive relief on its ability to continue operation; (3) the gravity of the violation; (4) the good faith efforts made by the business to comply with applicable statutory requirements; (5) any economic benefit gained by the violations; (6) deterrence of future violations; and (7) the fair and equitable treatment of the regulated community." *Carothers v. Capozziello*, supra, 215 Conn. at 103-104, 574 A.2d 1268 (listing factors to be considered in imposing civil penalty pursuant to General Statutes § 22a-226 pertaining to penalty for violation of solid waste management statutes); see also *Rocque v. Farricielli*, 269 Conn. 187, 210, 848 A.2d 1206 (2004) (factors listed in *Carothers* are to be considered in imposing civil penalties pursuant to General Statutes §§ 22a-226a [governing penalties for violation of selected solid waste management statutes] and 22a-438 [a] [governing penalties for violation of water pollution control statutes]). None of the parties argue that these factors should apply in the present case, however, and the trial court did not identify the factors that entered into its calculations.

impose on the airport defendants a plan of its own to restore the land to its condition prior to the violation. Nor was it required to issue a general order to the airport defendants that they restore the land to its prior condition, which almost certainly would have led to additional litigation. Accordingly, we conclude that the trial court did not abuse its discretion in declining to order the airport defendants to restore the land.

We also reject the plaintiffs' argument that the $50,000 contribution imposed pursuant to § 22a-16a (3) was supplemental to the $17,500 penalty imposed pursuant to § 2a-44 (b), not in lieu of it, and, therefore, should not be considered in determining whether the trial court abused its discretion. Section 22a-16a specifically provides that any financial contribution ordered pursuant to that statute is "in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded" under any other provision of title 22a that provides for a civil penalty. (Emphasis added.) Accordingly, we reasonably may conclude that, if the court had not ordered the financial contribution pursuant to § 22a-16a, the civil penalty pursuant to § 22a-44 (b) would have been greater. In addition, the court expressed its expectation that the entire $67,500 would be used to improve the condition of the land trust defendants' properties. The plaintiffs make no claim that the imposition of a civil penalty of $67,500 would have been an abuse of discretion. As we have indicated, the trial court reasonably could have concluded that the plaintiffs' expert's estimated cost of restoration was excessive because the plan would not have restored the land to its previous condition, but would have improved the condition. Accordingly, we conclude that the trial court did not abuse its discretion in imposing a civil penalty of $17,500 pursuant to § 22a-44 (b).

VI

We next address the plaintiffs' claim on cross appeal that the trial court improperly suspended the calculation of per diem civil penalties upon the commission's issuance of the cease and desist order. We disagree.

The following additional facts are relevant to our resolution of this issue. As we have indicated, on January 2, 2001. Ventres issued an order to the airport defendants ordering them to cease and desist from all regulated activity on the airport property and on the land trust defendants' properties. The order identified the prohibited regulated activity as "clear-cutting of a flood plain forest . . . and disturbance of the flood plain soils around the tidal inlet at the end of the property . . . ." The order stated that "[s]atisfactory corrective measures are not to be done without a permit from the [c]ommission" and required the airport defendants to appear at a hearing on January 11, 2001, to show cause why the order should not remain in effect. Because several commission members had recused themselves from the matter, however-apparently because the airport defendants had alleged a conflict of interest-no quorum was available on the date of the hearing. At a June 11, 2001 commission meeting on a related matter, counsel for the airport defendants withdrew the conflict of interest claim as to two of the three commission members who had recused themselves.[40] The cease and desist hearing was never rescheduled, however, and the plaintiffs never issued any order to the airport defendants to correct the condition of the land trust defendants' land. See General Statutes § 2a-

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[40] The airport defendants represent in their brief that the June 11, 2001 meeting concerned an application submitted by the airport to extend its runway. They argue that they did not intend to withdraw their motion to disqualify the commission members in proceedings on the pending cease and desist order. We need not decide whether the commission members were recused after June 11, 2001, however, because the issue is irrelevant to our analysis.

44 (a) (inland wetlands agency is authorized to issue order to correct condition created by violation of the act).

As we have indicated, the trial court imposed a $500 per diem fine on the airport defendants for the thirty-five days between the day that they began cutting the trees on the land trust defendants' properties, November 29, 2000, and the day that the cease and desist order was issued, January 2, 2001. The court reasoned that, because the order was never lifted, it prevented "the airport defendants from implementing any corrective or remedial plan because such action would necessarily involve the removal and deposition of material at the site and would alter wetlands, albeit for environmentally beneficial purpose." The plaintiffs argue that the trial court improperly limited the per diem penalties to the thirty-five day period because the cease and desist order did not prevent the airport defendants from submitting a restoration plan to the commission. They further argue that, because they requested restoration of the land in their complaint, which listed a return date of May 8, 2001, and because the airport defendants made no effort to submit a restoration plan up to the date of the court's decision, May 21, 2004, the trial court should have imposed civil penalties for that entire period.

We conclude that the plaintiffs' argument is flawed in several respects. First, § 22a-44 (b) authorizes the imposition of civil penalties for violations of the act. In the present case, the violation consisted of clear-cutting the properties. The plaintiffs have provided no authority for the proposition that the statute authorizes the imposition of civil penalties for the failure to remediate such violations in the absence of any administrative or court order to do so. Moreover, whether the airport defendants were required to restore the properties and, if so, the nature and scope of any such work, were the very issues in dispute in the litigation initiated by the plaintiffs. The plaintiffs have provided no authority for the proposition that, during the pendency of the action, the

airport had a duty under the act to submit a restoration plan. We conclude, therefore, that it was not an abuse of discretion for the trial court to limit the per diem penalties to the period during which the violation occurred and to decline to impose per diem penalties for the period during which the action was pending.

VII

We next address the land trust defendants' claim on cross appeal that the trial court improperly struck their cross claim under CUTPA. We disagree.

The following procedural history is relevant to our resolution of this issue. The land trust defendants alleged in the fifth count of their cross claim that: (1) the airport defendants had violated CUTPA by threatening expensive and protracted litigation "in an attempt to stifle the [land trust] and its individual volunteer members' participation in government process"; (2) Mellon had a history of using bad faith litigation to further his business interests and had initiated litigation against the members of the land trust board in an effort to "squelch opposition"; and (3) the trees were clear-cut to facilitate the expansion of the airport's runway, which otherwise would not have been permitted, and directly injured the land trust defendants' business interests of protecting and preserving property for public enjoyment. The airport defendants filed a motion to strike the CUTPA claim on the grounds that they were merely defending themselves against the action filed by the plaintiffs and that their defense against the action was not their "trade or business." They also argued that the airport defendants had not alleged any facts that would support a claim under CUTPA. The trial court granted the motion to strike on the ground that the land trust defendants were not competitors or customers of the airport defendants.

The land trust defendants now claim that the trial court improperly determined that CUTPA imposes a requirement

that the plaintiff be either the defendant's competitor or its customer. They argue that CUTPA protects businesspersons in general, not just consumers and competitors, and that the airport defendants' conduct interfered with their business of protecting natural resources. The airport defendants counter, essentially as an alternate ground for affirmance, that the land trust defendants' claims that the airport defendants were using litigation to intimidate and stifle the participation of the land trust and its volunteers in government process and that Mellon had a history of initiating baseless litigation to further his business interests are entirely without factual basis and, in any event, cannot support a CUTPA claim as a matter of law. The airport defendants do not address the claim that clear-cutting the land trust defendants' land to advance their own business interest in facilitating the expansion of the runway was a CUTPA violation.

"The standard of review in an appeal challenging a trial court's granting of a motion to strike is well established. A motion to strike challenges the legal sufficiency of a pleading, and, consequently, requires no factual findings by the trial court. As a result, our review of the court's ruling is plenary. . . . We take the facts to be those alleged in the complaint that has been stricken and we construe the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Citations omitted; internal quotation marks omitted.) *Jewish Home for the Elderly of Fairfield County, Inc. v. Cantore*, 257 Conn. 531, 537-38, 778 A.2d 93 (2001).

"[General Statutes §] 42-110b (a) provides that [n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. It is well settled that in determining whether a practice violates CUTPA we have adopted the

criteria set out in the cigarette rule by the federal trade commission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise-in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]. . . . All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." (Internal quotation marks omitted.) *Hartford Electric Supply Co. v. Allen-Bradley Co.*, 250 Conn. 334, 367-68, 736 A.2d 824 (1999).

"[W]e previously have stated in no uncertain terms that CUTPA imposes no requirement of a consumer relationship. In *McLaughlin Ford, Inc. v. Ford Motor Co.*, 192 Conn. 558, [566-67], 473 A.2d 1185 (1984), we concluded that CUTPA is not limited to conduct involving consumer injury and that a competitor or other business person can maintain a CUTPA cause of action without showing consumer injury." (Internal quotation marks omitted.) *Macomber v. Travelers Property & Casualty Corp.*, 261 Conn. 620, 643, 804 A.2d 180 (2002).

With respect to the land trust defendants' allegations that the airport defendants had threatened and actually engaged in oppressive litigation tactics, we conclude that the trial court properly determined that the allegations did not support a CUTPA claim. We note that the allegations are vague in that they do not indicate whether the land trust defendants are claiming that the airport defendants' litigation conduct in the present case was improper or that they had initiated a separate action against the members of

the land trust board. To the extent that the land trust defendants claim that the conduct of the airport defendants in defending themselves from the claims against them in the present action was improper, they have not cited any authority for the proposition that a defendant's vigorous defense against a lawsuit may form the basis for a CUTPA claim in that very lawsuit. Although the land trust defendants make a passing reference in their brief to this court to an action filed by the airport defendants in federal court, they do not discuss the nature or status of that action. We recently have held that claims based on the improper litigation conduct of the defendant in another pending action were properly stricken as duplicative and premature.[41] See *Larobina v. McDonald*, 274 Conn. 394, 407-408, 876 A.2d 522 (2005). Likewise, the allegations in the present case would require the trial court to determine the validity of the airport defendants' claims in a separate action that apparently is still pending, thereby giving rise to duplicative litigation and potentially inconsistent verdicts. Accordingly, we conclude that the trial court properly struck these allegations.

With respect to the land trust defendants' claim that the trial court improperly struck their allegation that the airport defendants' violated CUTPA by clear-cutting their land to advance their business interest in expanding the runway,

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[41] The Appellate Court has suggested in dicta that "a party's use of its economic powers in an attempt to stifle individual citizens' use of valid governmental processes by threat of expensive litigation potentially constitutes a violation of CUTPA, which is expressly modeled on § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)." *Zeller v. Consolini*, 59 Conn. App. 545, 562 n. 7, 758 A.2d 376 (2000). In Zeller, the defendants initiated the sham litigation, in which the plaintiff ultimately prevailed. *Id.*, at 547-48, 758 A.2d 376. The court, in *Zeller*, did not indicate that conduct in defending a lawsuit or conduct in a separate pending action could form the basis of a CUTPA claim.

the land trust defendants argue that this court expressly has held that CUTPA does not require the existence of a consumer relationship and implicitly has held that a competitor relationship is not necessary. See *Macomber v. Travelers Property & Casualty Corp.*, supra, 261 Conn. at 643, 804 A.2d 180 (upholding CUTPA claim where plaintiffs were neither consumers nor competitors of defendant). The land trust defendants argue that the cigarette rule "encompasses businesspersons in general," that they are in the business of protecting natural resources, and that they are "competing [with the airport defendants] for the airspace that the trees had occupied." We are not persuaded. Even if we assumed that the land trust defendants are in the business of protecting natural resources, we cannot conclude that the interference with that business by a trespasser constitutes an unfair trade practice. Such a conclusion would convert every trespass claim involving business property into a CUTPA claim. We also reject the land trust defendants' claim that they are "competing" with the airport defendants for the rights to the airspace over their properties. The relationship between the land trust defendants and the airport defendants cannot be characterized as competitive in any ordinary business sense. Rather, before the clear-cutting, the relationship was merely one of neighboring landowners. After the clear-cutting, the relationship was one of landowner and trespasser. Accordingly, we reject the land trust defendants' argument that they had a business relationship with the airport defendants.

The land trust defendants argue, alternatively, that a CUTPA plaintiff is not required to allege any business relationship with the defendant. They have provided no authority, however, for that proposition. Cf. *Macomber v. Travelers Property & Casualty Corp.*, supra, 261 Conn. at 626, 804 A.2d 180 (plaintiffs were not consumers or competitors of defendant, but had entered into settlement agreements

with defendant). Accordingly, we reject this argument. We conclude that the trial court properly determined that the land trust defendants' allegation that the airport defendants violated CUTPA by clear-cutting their land to advance their business interest in expanding the runway is insufficient to support a CUTPA claim, and, therefore, that the court properly granted the motion to strike the CUTPA claim.

VIII

Finally, we address the claim of the land trust defendants on cross appeal that the trial court improperly determined that they were precluded from introducing evidence concerning the replacement value of the trees in support of their claim for damages pursuant to § 52-560. We disagree.

The following additional procedural history is relevant to our resolution of this claim. The land trust defendants claimed in the second count of their cross claim that the airport defendants had intentionally trespassed on their property and had intentionally destroyed their trees, entitling them to treble damages under § 52-560. At trial, the land trust defendants did not introduce any evidence as to the value of the trees as cut wood or as to the diminution of the value of their land as a result of the clear-cutting. Instead, they asked the trial court to award treble damages under § 52-560 based on the replacement value of the trees and submitted a report by Bruce Spaman, an arboriculture and forestry consultant with Forest Management Services, estimating that the cost of replacement would be between $203,400 and $220,350.

The trial court concluded that the claim was precluded by the Appellate Court's decision in *Stanley v. Lincoln*, 75 Conn. App. 781, 818 A.2d 783 (2003). In that case, the Appellate Court stated that "[t]here are three possible measure of damages for loss of a tree in Connecticut." (Internal quotation marks omitted.) *Id.*, at 785, 818 A.2d 783.

In an action for trespass that alleges the loss of trees, "[i]t is an appropriate remedy either for the recovery of damages for the mere unlawful entry upon the plaintiff's land; for the recovery of the value of the trees removed, considered separately from the land; or for the recovery of damages to the land resulting from the special value of the trees as shade or ornamental trees while standing on the land. For a mere unlawful entry upon land nominal damages only would be awarded. If the purpose of the action is only to recover the value of the trees as chattels, after severance from the soil, the rule of damages is the market value of the trees for timber or fuel. For the injury resulting to the land from the destruction of trees which, as a part of the land, have a peculiar value as shade or ornamental trees, a different rule of damages obtains, namely, the reduction in the pecuniary value of the land occasioned by the act complained of. . . .

"This common-law rule has been embodied in § 52-560 . . . . That statute does not give a new and independent cause of action, but prescribes the measure of damages in cases where compensatory damages would, in the absence of the statute, be recoverable." (Citations omitted; internal quotation marks omitted.) *Id.*, at 785-86, 818 A.2d 783.

"[R]eplacement value is not a proper measure of damages in tree cutting cases because [s]uch a measure of damages . . . would lead to unreasonable recoveries in excess of the market value of the land . . . would raise impossible issues in resolving the replacement values of healthy or partially damaged trees . . . [and] cannot be practically applied." (Internal quotation marks omitted.) *Id.*, at 789 n.7, 818 A.2d 783, quoting *Maldonado v. Connecticut Light & Power Co.*, 31 Conn. Supp. 536, 539, 328 A.2d 120 (1974). Although the court in Maldonado concluded that the cost of replacing the trees was not a proper measure of damages, it stated that "[i]t is . . . well established that [the diminution in property value as a result of cutting the trees]

may be determined by the cost of repairing the damage, provided, of course, that that cost does not exceed the former value of the property and provided also that the repairs do not enhance the value of the property over what it was before it was damaged." (Internal quotation marks omitted.) *Maldonado v. Connecticut Light & Power Co.*, supra, at 539, 328 A.2d 120.

In order to resolve this claim, it is necessary to clarify the Appellate Court's ruling in *Stanley*. The Appellate Court suggested in that case that the common-law rule that the diminution in property value is a proper measure of damages in tree cutting cases had been embodied in § 52-560. *Stanley v. Lincoln*, supra, 75 Conn. App. at 786, 818 A.2d 783. The court also suggested that, under the common law, the replacement value of the trees was not a proper measure of damages and, therefore, was not a proper measure of damages under § 52-560. See *id.*, at 788-89, 818 A.2d 783. We do not entirely agree with this analysis. Rather, we conclude that, although damages for the reduction in pecuniary value of the land-determined by the replacement cost of the trees, if appropriate-were available under the common law,[42] the plain language of § 52-560 authorizes treble damages only for the value of the trees as commodities, not for the reduction in the pecuniary value or for the replacement cost of the trees. "We are not permitted to supply statutory language that the legislature may have chosen to omit." (Internal quotation marks omitted.) *Connecticut Light & Power Co. v. Dept. of Public Utility Control*, 266 Conn. 108, 119, 830 A.2d 1121 (2003). Accordingly, we conclude that the trial court properly determined that

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[42] The land trust defendants made no such claim under the common law. Accordingly, there is no need to decide in this case whether the enactment of § 52-560 preempted a common-law cause of action.

replacement cost was not a proper measure of damages under § 52-560.

The land trust defendants argue, however, that this court should "recognize an exception to the limitation on damages set forth in [*Stanley*]" and permit damages to be calculated on the basis of the replacement cost of the trees when "the value of the property lies in its place within the environment, rather than as a potential building lot or a working woodlot." As we have indicated, however, the plain language of the statute precludes such a reading. "[This] court is precluded from substituting its own ideas of what might be a wise provision in place of a clear expression of legislative will." (Internal quotation marks omitted.) *Skindzier v. Commissioner of Social Services*, 258 Conn. 642, 661, 784 A.2d 323 (2001). Accordingly, we decline to read into § 52-560 the exception urged by the land trust defendants.

The judgment is affirmed.

In this opinion the other justices concurred.

APPENDIX B

SUPREME COURT OF CONNECTICUT

Arthur J. ROCQUE,
Commissioner of Environmental Protection,
v.
Timothy MELLON et al.

No. 17281.

Argued April 14, 2005.
Decided Aug. 30, 2005.

John R. Bashaw, New Haven, for the appellants-appellees (named defendant et al.).

Janet P. Brooks and David H. Wrinn, assistant attorneys general, with whom, on the brief, was Richard Blumenthal, attorney general, for the appellee-appellant (plaintiff).

SULLIVAN, C.J., and BORDEN, NORCOTT, PALMER and ZARELLA, Js.

SULLIVAN, C.J.

This appeal arises out of a complaint filed by the plaintiff, Arthur J. Rocque, the commissioner of environmental protection (commissioner), against the defendants, Timothy Mellon, Goodspeed Airport, LLC (airport), the East Haddam Land Trust (land trust) and the Nature Conservancy (conservancy). The commissioner alleged that Mellon and the airport (collectively, airport defendants) violated General Statutes § 22a-16[1] of the

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[1] General Statutes § 22a-16 provides: "The Attorney General, any political subdivision of the state, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal

Connecticut Environmental Protection Act (act) by cutting down trees and other vegetation on two properties owned, respectively, by the land trust and the conservancy (collectively, land trust defendants). After a trial to the court,[2] the court rendered judgment for the airport defendants on count one of the complaint alleging unreasonable impairment of wetlands and watercourses in violation of § 22a-16, and for the commissioner on count three of the complaint alleging unreasonable impairment and destruction of floodplain forest in violation of § 22a-16.[3]

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entity may maintain an action in the superior court for the judicial district wherein the defendant is located, resides or conducts business, except that where the state is the defendant, such action shall be brought in the judicial district of Hartford, for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity, acting alone, or in combination with others, for the protection of the public trust in the air, water and other natural resources of the state from unreasonable pollution, impairment or destruction provided no such action shall be maintained against the state for pollution of real property acquired by the state under subsection (e) of section 22a-133m, where the spill or discharge which caused the pollution occurred prior to the acquisition of the property by the state."

[2] The case was tried jointly with an action brought by the inland wetlands and watercourses commission of the town of East Haddam and its enforcement officer, James Ventres, against Mellon, the Goodspeed Airport, LLC, and Timothy Evans. The trial court's ruling in that case is the subject of the airport defendants' appeal in the companion case of *Ventres v. Mellon*, 275 Conn. 105, 881 A.2d 937 (2005).

[3] The commissioner withdrew count two of the complaint, which alleged a violation of General Statutes § 22a-42a(c)(1).

The airport defendants appealed[4] and the commissioner cross appealed. We conclude that the trial court improperly rendered judgment for the airport defendants on count one of the commissioner's complaint. We affirm the judgment of the trial court in all other respects.

The record reveals the following relevant facts and procedural history. The airport is located on Lumberyard Road in East Haddam. It is an "[a]irport available for public use" within the meaning of title 14 of the Code of Federal Regulations, § 77.2.[5] Mellon is the sole member of Goodspeed Airport, LLC. The airport's southern boundary lies approximately along the centerline of a tidal creek that flows in a westerly direction into the Connecticut River. That boundary forms the northern boundary of property owned by the land trust, which extends for approximately 335 feet to the south, where it abuts property owned by the conservancy. The conservancy's property extends for another 100 feet to the south, at which point it abuts Chapman Pond. The airport has a 2100 foot runway that runs in a north-south direction. The southern end of the runway is approximately 630 feet north of the airport's southern boundary and 1100 feet north of Chapman Pond.

Between November 29, 2000, and December 5, 2000, Timothy Evans, an independent contractor and the manager of the airport since November, 2003, cut down all of the trees, bushes and woody vegetation on approximately 2.5 acres of land located between the southern boundary of the airport property and Chapman Pond. Evans cut the

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[4] The airport defendants appealed to the Appellate Court and we transferred the appeal to this court pursuant to General Statutes § 51-199(c) and Practice Book § 65-1.

[5] Title 14 of the Code of Federal Regulations, § 77.2 defines an "[a]irport available for public use" as "an airport that is open to the general public with or without a prior request to use the airport."

vegetation at the direction of Mellon and without the permission of the land trust defendants. Approximately 340 trees were destroyed, including some that were 100 years old and seventy-two feet high. The airport defendants claim that the trees and vegetation posed a danger to aircraft landing at and taking off from the runway. The 2.5 acres were entirely within a regulated wetlands area as defined by General Statutes § 22a-38(15)[6] and were part of a wildlife refuge and nature preserve that extends along the Connecticut River.

Thereafter, the commissioner brought this action alleging that the airport defendants violated the act by cutting the trees and vegetation. In count one of the complaint, the commissioner alleged that "[b]y clear cutting trees on the properties of the [land trust defendants] . . . without a permit issued under the Inland Wetlands and Watercourses Act, [General Statutes § 22a-28 et seq.] the [airport defendants] unreasonably impaired wetlands and watercourses, natural resources of the State of Connecticut, and the public trust therein." In count three of the complaint, the commissioner alleged that "[b]y clear cutting trees on the properties of the [land trust defendants] . . . the [airport defendants] unreasonably impair[ed] or destroyed approximately four acres of floodplain forest, a natural resource of the State of Connecticut, and the public trust therein." The airport defendants raised numerous special defenses to the commissioner's complaint, including a claim that the plaintiff's action was preempted by federal aviation

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[6] General Statutes § 22a-38(15) defines " '[w]etlands' " as "land, including submerged land, not regulated pursuant to sections 22a-28 to 22a-35, inclusive, which consists of any of the soil types designated as poorly drained, very poorly drained, alluvial, and floodplain by the National Cooperative Soils Survey, as may be amended from time to time, of the Natural Resources Conservation Service of the United States Department of Agriculture . . . ."

law. After a trial to the court, the court rendered judgment for the airport defendants on count one of the complaint on the ground that the failure to obtain a necessary environmental permit cannot form the basis for a claim under the act. The court rejected the airport defendants' preemption claim and rendered judgment for the commissioner on the third count of the complaint. This appeal and cross appeal followed.

On appeal, the airport defendants claim that the trial court: (1) improperly determined that the act is not preempted by federal aviation law; (2) should have rendered judgment for them on count three of the complaint for the same reasons that it rendered judgment for them on count one; (3) improperly determined that the removal of vegetation from the properties was a regulated activity under the inland wetlands and watercourses act; and (4) improperly determined that Mellon was personally liable for cutting the trees. The commissioner claims on cross appeal that the trial court improperly rendered judgment for the airport defendants on count one of its complaint because the claim was primarily directed to the polluting activity itself and not to the failure to obtain a permit. In the companion case of *Ventres v. Mellon*, 275 Conn. 105, 881 A.2d 937 (2005), we rejected claims identical to the airport defendants' first, third and fourth claims in the present case. We adopt the reasoning and conclusions of that case herein. We agree with the commissioner's claim on cross appeal that the trial court improperly rendered judgment for the airport defendants on count one of its complaint and, for the same reasons, we reject the airport defendants' second claim on appeal.

Because our resolution of the commissioner's claim on cross appeal guides our resolution of the airport defendants' sole remaining claim on appeal, we first address that issue. The commissioner alleged in count one of its complaint that "[b]y clear cutting trees on the properties of the [land trust

defendants] . . . without a permit issued under the Inland Wetlands and Watercourses Act, the [airport defendants] unreasonably impaired wetlands and watercourses, natural resources of the State of Connecticut, and the public trust therein." The trial court, citing this court's decision in *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 138-48, 836 A.2d 414 (2003), concluded that "the failure to obtain a license or permit to engage in conduct which impinges on the environment cannot form the basis for a . . . claim under § 22a-16." In support of its claim on cross appeal, the commissioner argues that count one of the complaint is not foreclosed by *Connecticut Coalition Against Millstone* because he did not allege that the airport defendants' failure to obtain a permit violated § 22a-16, but that the clear-cutting itself constituted unreasonable pollution.

The commissioner's claim implicates its standing to raise a claim under § 22a-16 and, therefore, implicates the trial court's subject matter jurisdiction over the claim. See *id.*, at 127-28, 836 A.2d 414. "A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Id.*

In *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. 116-18, 134, 836 A.2d 414, the plaintiffs, environmental activists, claimed that the Millstone Nuclear Power Generating Station should be enjoined from operating because it was functioning under an improperly issued permit. We determined that "[a]llegations of improper decisions by the commissioner for failure to comply with the statutory requirements regarding permit renewal proceedings and emergency authorizations cannot be construed as anything other than a licensing claim under

[General Statutes] § 22a-430." *Id.*, at 134, 836 A.2d 414. Relying on a long series of cases in which we had held that § 2a-16 does not confer standing to litigate permitting decisions that are within the exclusive jurisdiction of a state agency, we concluded that the trial court properly had dismissed the plaintiffs' claims. *Id.*, at 129-38, 836 A.2d 414. In doing so, we distinguished other cases in which we had determined that the plaintiffs had standing under § 22a-16 because, although the lack of an appropriate permit had been alleged, the plaintiffs had raised independent "claims of unreasonable pollution [that] were directed primarily to the polluting activity itself, and not . . . to the validity of an existing permit or authorization . . . ." *Id.*, at 139-40, 836 A.2d 414, citing *Keeney v. Old Saybrook*, 237 Conn. 135, 140-41, 676 A.2d 795 (1996) (alleging unreasonable pollution of state waters from town's failure to comply with pollution abatement orders); *Commissioner of Environmental Protection v. Connecticut Building Wrecking Co.*, 227 Conn. 175, 190, 629 A.2d 1116 (1993) (alleging unreasonable pollution from failure to obtain permit for operation of solid waste facility that generated leachate, which degraded groundwater); *Keeney v. L & S Construction*, 226 Conn. 205, 209, 626 A.2d 1299 (1993) (alleging unreasonable pollution from depositing construction debris in close proximity to area water supply without permit).

We conclude that count one of the commissioner's complaint in the present case falls into the category of the cases that we distinguished in *Connecticut Coalition Against Millstone*. The commissioner did not claim that the airport defendants' failure to obtain a wetlands permit constituted a violation of § 22a-16; he claimed that clear-cutting the trees constituted unreasonable pollution. Accordingly, we conclude that the commissioner had standing to make this claim and, therefore, that the trial court improperly rendered judgment for the airport defendants.

Because the trial court concluded that the claim was barred by *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. 116, 836 A.2d 414, it did not reach the issue of whether the conduct alleged in count one of the complaint constituted unreasonable pollution under § 22a-16. We address the question in the interest of judicial efficiency and to avoid the potential for inconsistent verdicts. In *Waterbury v. Washington*, 260 Conn. 506, 557, 800 A.2d 1102 (2002), we held that "when there is an environmental legislative and regulatory scheme in place that specifically governs the conduct that the plaintiff claims constitutes an unreasonable impairment under [§ 22a-16], whether the conduct is unreasonable under [§ 22a-16] will depend on whether it complies with that scheme." We concluded in *Ventres v. Mellon*, supra, 275 Conn. at 132, 881 A.2d 937 that in the absence of any property right that would have entitled the airport defendants to apply for a wetlands permit to clear-cut the properties, their activities necessarily would not have been permitted. Therefore, we concluded that the trial court properly determined that the conduct alleged by the land trust defendants was unreasonable. See *id.*, at 135-37 and n. 29, 881 A.2d 937 (concluding that trial court properly rendered judgment for land trust defendants on cross claim pursuant to § 22a-16). It necessarily follows that the conduct alleged in count one of the commissioner's complaint constituted an unreasonable destruction of the wetlands. Accordingly, we conclude that the trial court should have rendered judgment for the commissioner on this claim.[7]

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[7] On remand, the trial court will be required to determine whether count one of the commissioner's complaint was duplicative of count three for purposes of issuing orders pursuant to General Statutes § 22a-16a or whether the commissioner is entitled to additional orders under count one.

General Statutes § 22a-16a provides in relevant part: "In any action brought by the Attorney General under section 22a-16 or

For the same reasons, we reject the airport defendants' claim on appeal that the trial court improperly rendered judgment for the commissioner on the third count of its complaint. The commissioner made no claim that the airport defendants' failure to obtain a permit to destroy the floodplain forest violated § 22a-16. Indeed, count three makes no reference to any need for a permit. Instead, the claim was "directed primarily to the polluting activity itself . . . ." *Connecticut Coalition Against Millstone v. Rocque*, supra, 267 Conn. at 139, 836 A.2d 414. Accordingly, we conclude that the trial court properly rejected the airport defendants' claim that the land trust defendants lacked standing to make this claim and properly rendered judgment in favor of the commissioner.

On the plaintiff's cross appeal, the judgment is reversed in part and the case is remanded to the trial court with direction to render judgment for the plaintiff on count one of the complaint and for further proceedings to determine whether additional orders should be issued pursuant to

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under any provision of this title which provides for a civil or criminal penalty for a violation of such provision, the court, in lieu of any other penalties, damages or costs awarded, or in addition to a reduced penalty, damages or costs awarded, may order the defendant (1) to provide for the restoration of any natural resource or the investigation, remediation or mitigation of any environmental pollution on or at any real property which resource or property are unrelated to such action, (2) to provide for any other project approved by the Commissioner of Environmental Protection for the enhancement of environmental protection or conservation of natural resources, (3) to make a financial contribution to an academic or government-funded research project related to environmental protection or conservation of natural resources, or (4) to make a financial contribution to the Special Contaminated Property Remediation and Insurance Fund established under section 22a-133t provided the total aggregate amount of all contributions to said fund under this section shall not exceed one million dollars per fiscal year . . . ."

General Statutes § 22a-16a under that count. The judgment is affirmed in all other respects.

In this opinion the other justices concurred.

APPENDIX C

UNPUBLISHED OPINION.
CHECK COURT RULES BEFORE CITING.

SUPERIOR COURT OF CONNECTICUT,
JUDICIAL DISTRICT OF TOLLAND

James VENTRES, et al.
v.
GOODSPEED AIRPORT, et al.
Nos. X07CV0100076812S, X07CV0200805405.

May 21, 2004.

Branse & Willis LLC, Glastonbury and Howd & Ludorf, Hartford, for James Ventres and East Haddam IWWC.

Brenner Saltzman & Wallman, New Haven, for Goodspeed Airport LLC, Timothy Mellon, Timothy Evans, East Haddam Land Trust and Nature Conservancy of Connecticut Inc.

Murtha Cullina LLP, Hartford, for The Nature Conservancy and East Haddam Land Trust.

Webber & Eisenstein LLC, Simsbury, for Arthur M. D'Onofrio.

AAG Janet Brooks, Hartford, for Connecticut Dept. of Environmental Protection.

SFERRAZZA, J.

On eight days between February 24 and March 9, 2004, the court presided over a joint trial to the court involving a case filed by plaintiffs, James Ventres, as enforcement officer for the East Haddam Inland Wetlands and Watercourses Commission ("the Commission"), and the Commission, against defendants, the Goodspeed Airport, LLC, Timothy Mellon, Timothy Evans, (collectively "the airport

defendants"), the East Haddam Land Trust ("the Land Trust"), and the Nature Conservancy, which case has docket number X07-CV01-0076812. The second case was one filed by plaintiff Arthur J. Rocque, Jr., as Commissioner of the state Department of Environmental Protection (DEP), against the same defendants, except for Evans, which case is docketed as X07-CV02-0080540. In this memorandum the court will also decide the issues raised by the cross claims of the defendants filed in the wetlands commission case. Trial of the counterclaims of Mellon, Evans, and Goodspeed Airport, LLC, has been bifurcated for adjudication at a later date.

The disputes in these matters stem from the following incident. Between November 29 and December 5, 2000, at the direction of Mellon, the owner of the airport, Evans, an independent contractor, clear-cut approximately 2.5 acres of floodplain forest located on land owned by the Land Trust and land owned by the Conservancy. Evans severed all trees, bushes, and woody stemmed vegetation growing on this acreage. The remaining stumps ranged from ground level to a few feet in height. Around 340 trees were felled, as well as innumerable shrubs. Some of the trees cut by Evans were as old as 100 years and had grown seventy-two feet high.

The clear-cut land lies directly south of a tidal brook, which brook forms the boundary between airport land to the north and the Land Trust property to the south. The Conservancy owns land south of the Land Trust parcel, and to the south of that property is Chapman's Pond. A 2000-foot runway on the airport property runs generally from north to south and ends about 630 feet north of the tidal brook. The clear-cut area would be bisected by the center line of the runway if that center line were extended in a southerly direction. The Land Trust property is about 335 feet wide from the tidal brook to the Conservancy land. The

Conservancy property extends about 100 feet southerly until it reaches the high tide edge of Chapman's Pond.

The airport defendants never sought a permit or other approval from the Commission to lear-cut the area, which is roughly 300 feet wide and 325 feet long, nor did these defendants obtain permission from the Land Trust or the Conservancy to enter their property and cut vegetation. Additional facts will be recited where pertinent.

In X07-CV01-0076812, Ventres, on behalf of the Commission, sues the airport defendants, for clear-cutting in regulated wetlands without a permit or Commission approval to do so. Pursuant to General Statutes § 22a-44(b), the Commission seeks the imposition of civil penalties, an award of attorneys fees, expenses and costs, and injunctive relief. The Land Trust and Nature Conservancy, by way of cross claims, sue these defendants for indemnification, trespass, conversion, and the unreasonable impairment or destruction of natural resources under the Connecticut Environmental Protection Act (CEPA), and seek such compensatory damages, attorneys fees and costs, punitive damages, and injunctive relief as is provided by law, in particular General Statutes § 52-560 and CEPA. The airport and Mellon cross claim against the Land Trust and Nature Conservancy for trespass, negligence, negligent and absolute nuisance, conversion, and indemnification.

In X07-CV02-0080540, the DEP sues the airport and Mellon in two counts under CEPA, alleging a violation of statutory law governing wetlands and watercourses, and the unreasonable impairment or destruction of a forest, respectively. The DEP seeks declaratory and injunctive relief, attorneys fees, expenses, and costs, and monetary damages as provided for under CEPA.

I

THE EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION CLAIMS IN

X07-CV01-0076812

General Statutes § 22a-44(b) states:

> Any person who commits, takes part in, or assists in any violation of any provision of Sections 22a-36 to 22a-45, inclusive, including regulations adopted by the commission and regulations promulgated by municipalities . . . pursuant to the grant of authority herein contained, shall be assessed a civil penalty of not more than one thousand dollars for each offense.

In 1974, pursuant to General Statutes §§ 22a-36 and 22a-42, the town of East Haddam designated the East Haddam Inland Wetlands and Watercourses Commission as the local agency charged with regulating inland wetlands for the town. On October 17, 1974, the commission adopted regulations which were last revised on June 1, 1995.

Section 5 of the local regulations proscribes the engaging in regulated activity in wetlands without first securing a permit from the Commission. The clear-cut area is entirely wetlands, as that term is defined by General Statutes § 22a-38(15) and § 2.1.r of the local wetlands regulations, because that land consists of poorly or very poorly drained soils and is part of the Connecticut River floodplains.

The Commission has proven, by a preponderance of the evidence, that the clear-cutting of the 2.5 acres of floodplain forest is a regulated activity within the meaning of the local regulations and state statutes. The clear-cutting which took place on this wetlands was a "regulated activity" because the local regulations define that phrase to embrace any activity within or use of a wetlands which involves the

alteration of the wetlands, with certain, specific exceptions inapplicable to the circumstances of the present case.

The floodplain forest which was clear-cut comprised diverse species of hardwood trees and woody shrubs. As noted above, around 340 trees and tree sprouts were severed on Land Trust property and a few more on Conservancy land. These trees acted as a flood brake, slowing the velocity of the occasional floodwaters of the Connecticut River which regularly spill into the floodplains and eventually into Chapman's Pond. The slower the flow of floodwater, the less erosion, scouring, and damage to the submerged land and water bodies is done. The taller and denser the floodplain forest, the greater the buffering capacity to slow floodwaters. Undoubtedly, the felling of all trees and woody vegetation over 2.5 acres in the midst of a floodplain corridor between the Connecticut River and Chapman's Pond altered that wetlands and the abutting floodplains and wetlands.

Under General Statutes § 22a-42a(c)(1) and § 5.1 of the local regulations, no regulated activity, including the clear-cutting of 2 .5 acres of floodplain forest as was done by and for the airport defendants, can proceed without obtaining a permit from the Commission. As recounted earlier, these defendants never sought nor secured such a permit. Therefore, unless the airport defendants can interpose a special defense which removes them from this permit requirement, they are liable under § 22a-44(b) for the remedies and penalties provided therein.

II

SPECIAL DEFENSES

A.

PREEMPTION

The first special defense asserted by the airport defendants is federal preemption. These defendants argue

that because the Federal Aviation Administration (FAA) has promulgated regulations which prohibit the presence of obstructions, such as tree limbs, within the navigable airspace known as an "approach slope," and because trees growing in the area which was clear-cut regularly attain heights which protrude into that airspace, the local and state laws requiring a permit to remove these trees are preempted. The court rejects this argument.

There exists "a strong presumption against federal preemption of state or local legislation." *Dowling v. Slotnik*, 244 Conn. 781, 794 (1998). Only when the federal government has shown a "clear and manifest" purpose to supersede state and local authority does preemption apply. *Id.*, at 795.

Consequently, it is assumed that a federal agency had no intent to preempt the exercise of local police power unless (1) the federal law or regulation expressly directs the ouster of local authority; (2) such intent should be inferred because the federal government has legislated comprehensively so as to occupy the entire field in question, leaving no room for local regulation in the area; or (3) the local regulation under scrutiny conflicts with federal rules because it is impossible to comply with both provisions or because the local law creates an obstacle to the accomplishment or execution of federal objectives. *Commission On Human Rights v. Sullivan Associates*, 250 Conn. 763, 772-73 (1999).

The parameters of the imaginary surfaces which compose the air corridor known as the approach slope are set forth in Federal Aviation Regulations (FAR) Part 77, 14 CFR § 77.1ff. It is these standards which the airport defendants claim preempt local regulation of the tree cutting which occurred in this case.

Part 77 sets forth criteria for determining whether objects, natural or manmade, protrude into the approach slope so as to obstruct air navigation. The text of Part 77

lacks any language which reasonably suggests that the standards contained therein for approach slope surfaces were meant to preempt state or local law regarding the objects which might intrude into the approach slope.

Next, the standards of Part 77 neither completely occupy nor exhaust the field of inland wetlands regulations as those regulations might burden or impinge upon the removal of protruding tree tops. Part 77 is bereft of discussion pertaining to wetland usage or environmental concerns generally. Those standards do not dictate how such natural obstacles should be pruned or removed or how often or what techniques ought to be employed in wetlands.

It had been held that the absence of such language in Part 77, which preemptive language is present in other FAR parts, implies that the standards of Part 77 neither prohibit the presence of such obstacles nor require the removal of any obstruction. *Catchings v. Glendale*, 743 P.2d 400, 404 (Ct. App. Ariz.1987). The criteria contained in Part 77 merely guide airports in evaluating whether a given object poses a hazard to air navigation. *Id.*

The mere fact that federal and local law deal with the same general topic creates no inference of federal preemption. See *Cox Cable Advisory Council v. DPUC*, 259 Conn. 56 (2002); *Dowling v. Slotnik*, supra; and *Commission On Human Rights v. Sullivan Associates*, supra. In the present case, the federal approach slope standards and the local and state wetlands provisions regulate disparate activities and are concerned with unrelated topics. The federal approach slope guidelines and state and local wetlands regulations touch only remotely and tangentially.

These local and federal regulations cover different ground. The wetlands regulations contain neither prescriptions nor proscriptions regarding navigable airspace or the removal of objects therefrom. The local regulations do not forbid the trimming or removal of trees growing in a

floodplain but simply require that a permit issue before such activity occurs. The state and local wetlands provisions neither conflict with nor render impossible the satisfaction of the standards propounded under Part 77.

Because the pertinent FAA rules fail explicitly to preempt local wetlands regulation, fail to occupy the field of wetland use near airports, and there is no irreconcilable conflict between the goals of Part 77 regarding safe approach slopes and local wetland permit requirements, no federal preemption exists to negate the airport defendants' liability in this case.

B.

MUNICIPAL ESTOPPEL

The airport defendants plead a second special defense alleging that the Commission is estopped from requiring the airport to obtain a permit before removing trees in the floodplains which adjoin the airport's property as long as the Connecticut Department of Transportation ("DOT") has characterized the presence of trees growing into the approach slope surfaces as hazardous to the safe use of the airport's runway. It should be observed that the DOT has been designated as the inspecting agent of the FAA with respect to safety inspections of this airport.

These defendants contend that municipal estoppel arises from two incidents in the past. First, in July 1999, about sixteen months before the clear-cutting, Ventres told Mellon that no wetlands permit was necessary to remove seven trees growing in wetlands located on airport property to the north of the tidal brook as long as the DOT had identified those trees as interfering with airport safety. Second, Ventres was present in the fall of 1999, during discussions between the airport and representatives of the Land Trust regarding a proposal to realign the runways. The realignment proposal included the removal of several trees south of the brook which divided the two properties. The

airport defendants claim that, during these negotiations, Ventres never voiced the need to obtain a permit in order to actuate the proposal.

Before invoking municipal estoppel, the airport defendants have a heavy burden of demonstrating the existence of the following elements:

> (1) that Ventres, the Commission's enforcement officer, did or said something calculated or intended to induce Mellon to believe that no permit was needed before clear-cutting 2.5 acres of floodplain forest located south of the tidal brook; and
> (2) that the airport defendants changed their position based on Ventres' acts or words. *Collins Group, Inc. v. Zoning Board of Appeals*, 78 Conn. App. 561, 578 (2003).

Municipal estoppel may be applied only:

> (1) with great caution;
> (2) if the resulting wetlands violation has been unjustifiably induced by Ventres; and
> (3) when special circumstances make it highly inequitable or oppressive to enforce the wetland regulations. *Id.*

As a general rule, estoppel is inappropriate against a public agency in the exercise of a governmental function. *Ammirata v. Zoning Board of Appeals*, 65 Conn. App. 606, 617 (2001). The court finds that the airport defendants have failed to prove, by a preponderance of the evidence, that Ventres' deeds or words were calculated or intended to induce Mellon to believe that the airport had municipal permission to clear-cut nearly 350 trees and sundry bushes on the Land Trust property. It strains credulity to posit that permission to cut seven trees on airport property wetlands justified a belief that Ventres was intending to confer blanket approval to denude 2.5 acres of floodplain forest at a different location

on Land Trust property without a permit or that Ventres intended to induce Mellon to believe that Ventres' imprimatur had been placed upon such an undertaking.

Regarding the second incident, Ventres merely acted as a mediator to facilitate negotiations among the relevant parties, viz, the airport, the Land Trust, and the Goodspeed Opera House. He was not engaged at the time in the enforcement of Commission regulations. Also, it is highly doubtful that a municipal agent's silence can estop the agency from enforcing its regulations. *Bauer v. Waste Management of Connecticut*, 234 Conn. 221, 245 (1995). The rendering of assistance by a municipal officer or agent as to some aspects of a project, without more, is insufficient to create an implied authorization to complete the project nor to perform other project-related activities so as to estop the municipality from enforcing its laws. *Zoning Commission v. Lescynski*, 188 Conn. 724, 733 (1982).

C.

UNCLEAN HANDS

The third special defense repeats the allegations regarding Ventres' participation in the negotiations in the fall of 1999 and attempts to invoke the doctrine of unclean hands. This defense fails for two reasons.

First, the same findings and reasoning which caused the court to reject the municipal estoppel claim apply to this defense. The airport defendants have failed to meet their burden of proving that Ventres acted with unclean hands in mediating negotiations regarding realignment of the runway.

Next, the doctrine of unclean hands recognizes that one seeking equitable redress must have acted equitably in the first instance. *Ridgefield v. Eppoliti Realty Co.*, 71 Conn. App. 321, 334 (2002). Although the Commission's prayer for relief includes a claim for "[a]ny other remedy at law or equity as

may appertain," the basis for liability is a statutory one under § 22a-44(b). Thus, only if the court were to consider ordering some equitable remedy outside of the relief legislatively provided by § 22a-44(b) would this doctrine even apply.

D.

VESTED RIGHTS

The fifth special defense alleges that the issuance, in 1975, of a permit by the Commission to cut trees to the south of the runway spawned a vested right to clear-cut the 2.5 acres in perpetuity. The plaintiffs have denied that such an expansive permit ever issued.

No credible evidence was adduced at trial supporting this allegation. Therefore, the airport defendants have failed to prove this special defense.

E.

PERMIT UNNECESSARY DEFENSE

In the sixth special defense these defendants assert that the airport has a vested right to cut trees for airport safety reasons, without first obtaining a permit, because such conduct was lawful when the airport was established in 1965, nearly a decade before the Commission came into being. This assertion is meritless.

Section 22a-42a(b) states, in part, that local inland wetlands regulations "shall become effective at such time as is fixed by the inland wetlands agency . . . ." Section 22a-42a(c)(1) provides "[o]n or after the effective date of the municipal regulations promulgated pursuant to section (b) of this section, no regulated activity shall be conducted upon any inland wetland or watercourse without a permit." (Emphasis added.)

In addition, the Commission regulations became effective October 17, 1974. These regulations also command

that "[n]o person shall henceforth conduct a regulated activity in a regulated area of the Town of East Haddam without first obtaining a permit for such activity from the Commission." (Emphasis added.)

Neither the statute nor the local regulations include a grandfather provision exempting tree cutting in a floodplain forest simply because, before 1974, that activity did or could lawfully occur without a permit. Indeed, the Commission's regulations do contain such a provision for residential building lots for which a building permit issued which predates July 1, 1974. The conspicuous absence of a similar exemption for other regulated activity compels the conclusion that no such vested right exists.

The remaining special defense pertains to remedy and not liability and will be addressed, if necessary, later in this decision.

III

CEPA CLAIMS

In X07-CV02-0080540, the DEP alleges three counts under § 22a-16, against Mellon and the airport for violations of CEPA, General Statutes § 22a-14ff. The second count was previously withdrawn. In X07-CV01-0076812, the Land Trust and Nature Conservancy have filed a CEPA cross claim against these defendants under § 22a-16. All of these CEPA claims are resolved in this section, and a recitation of additional facts is necessary to achieve this resolution.

The 2.5-acre clear-cut section of the floodplain along the Connecticut River, in proximity to Chapman's Pond, is part of a two-mile stretch of floodplain which is internationally recognized as having important environmental significance. The Chapman's Pond complex of wetlands and watercourses, including the clear-cut area, affords a rare combination of ecological factors and habitats in which a great diversity of wildlife can flourish. Upland forest,

floodplain forest, marshland, mudflats, tidal streams, ponds, and a major estuarial river coexist in a relatively small neighborhood. This ecological mosaic supplies several "edge" or transitional environments which appeal to a wide variety of flora and fauna.

The floodplain forest surrounding Chapman's Pond serves as a winter haven for, at times, as many as eighty bald eagles, a threatened species. Winter roosting bald eagles need tall trees with wide tops, ready accessibility to open water despite frigid conditions, a supply of fish in that open water, and seclusion from the sights and sounds of civilization. The Chapman's Pond area is a prime winter roosting area for bald eagles in the United States. Bald eagles have roosted in some of the trees which grew in the clear-cut area.

The floodplain forest area which was clear-cut formed a visual and auditory barrier separating Chapman's Pond from the airport and villages to the north. The clear-cutting broke the continuity of the natural buffer surrounding Chapman's Pond. The activity of the airport and the businesses and residences north of the pond now penetrates through the corridor left by the felling of the vegetation and disrupts the tranquility which had previously existed. The Goodspeed Bridge is now easily seen from the pond; a sight which had been obscured for decades before the clear-cutting.

The opening of the 2.5 acres of floodplain forest has exposed that land and the surrounding land to the invasion and proliferation by nonnative plant species. Lacking indigenous parasites and predators, these invasive species exploit the opportunity offered by the removal of the forest shade, and choke out the chance for native flora to thrive there. Japanese stilt grass, an invidious foreign annual, has spread rapidly over portions of the clear-cut acreage. Tree sprouts, which would otherwise rise from the stumps of the severed trees and attain mature height are being browsed by

deer at a pace which makes recovery of the forest in the area a tenuous proposition. In order to promote regrowth of the floodplain forest, abundant planting of indigenous trees and shrubs, protected by deer fencing, will be needed.

Floodplains, as the word suggests, are prone to inundation caused by the periodic or seasonal overflow of water which is normally contained by the banks of a water body. As mentioned above, the clear-cut area is subject to such flooding by the Connecticut River, and the formerly forested area, being composed of the stout, nonfrangible trunks of mature trees, acted to curb the velocity of the flowing flood water. The absence of this arboreal cushion poses the real risk that flood water from the Connecticut River will flow faster through the clear-cut area and deposit larger quantities of silt and debris into Chapman's Pond than would previously have been sustained. The ecology of Chapman's Pond would be altered should that scenario occur.

A.

THE FIRST COUNT

The first count of the DEP complaint asserts a violation of CEPA, under § 22a-16, for unreasonable impairment to wetlands and watercourses based on the absence of a permit as required by § 22a-42a(c)(1). The court concludes that the DEP has proven, by a preponderance of the evidence, that the actions of Mellon, on behalf of the airport, in directing the leveling of the 2.5 acres of floodplain forest, impaired the floodplain upon which the forest stood and the wetlands and watercourses nearby.

The second element that the DEP must establish is that this impairment was unreasonable. The regulation of wetland activity is set forth in Chapter 440 of Title 22a of the General Statutes. When a specific, environmental legislative scheme is "designed to govern the particular conduct that is the target of the action, that scheme gives substantive

content to the meaning of the word unreasonable as used in the context of an independent action under CEPA." *Waterbury v. Washington*, 260 Conn. 506, 557 (2002). Compliance or noncompliance with that regulatory scheme will determine whether the activity in question is unreasonable. *Id.*

Paragraph 19 of the first count of the DEP complaint unequivocally states that the airport defendants unreasonably impaired wetlands "[b]y, clear cutting trees . . . without a permit issued under the Inland Wetlands and Watercourses Act." Paragraph 18 specifically cites a violation of § 22a-42a(c)(1) as the basis for this CEPA count. Section 22a-42a(c)(1) is, as mentioned above, the statutory section which prohibits performing regulated acts in a wetlands without a permit. However, the failure to obtain a license or permit to engage in conduct which impinges on the environment cannot form the basis for a CEPA claim under § 22a-16. *Connecticut Coalition Against Millstone v. Rocque*, 267 Conn. 116, 138-45 (2003). Therefore, no valid CEPA claim is alleged in the first count, and no relief can be granted under that count.

B.

THE THIRD COUNT

The third count of the DEP complaint and the sixth count of the cross claim of the Land Trust and the Nature Conservancy allege unreasonable impairment or destruction of the floodplain forest, qua forest, by the clear-cutting. Based on the factual findings recited above, the court concludes that these parties have proven, by a preponderance of the evidence, that Mellon and the airport impaired and/or destroyed 2.5 acres of environmentally significant floodplain forest.

The court also finds that this clear-cutting was unreasonable under all of the circumstances. In the past, only trimming and selective cutting of trees was employed

to remove such obstacles to air navigation which the growing trees created. There existed no sound reason to abandon that conservative practice. To sever every tree and woody-stemmed bush, regardless of height and species, destroyed important floodplain forest excessively and unnecessarily. The airport could have complied with Part 77 of the FAA regulations regarding approach slope without the total decimation of woody vegetation between the tidal brook and Chapman's Pond.

Therefore, unless some special defense absolves them from liability, Mellon and the airport are legally responsible under the CEPA claims of both the DEP and the cross claimants.

C.

SPECIAL DEFENSES TO CEPA CLAIMS

The airport and Mellon interpose several special defenses to the CEPA claims. The first, fifth, sixth, and seventh special defenses raise federal preemption, estoppel, and vested rights claims similar to the special defenses asserted in the case brought by Ventres and rejected by the court in sections II.A, II.C, and II.D of this memorandum. For the same reasons the court rejects these special defenses in this case also.

1.

The second special defense alleges that the DEP can maintain no cause of action under CEPA for the clear-cutting of floodplain forest because the Inland Wetlands and Watercourses Act (IWWA) is the sole source of remedy for any impairment of wetlands. The airport defendants point to the fact that the IWWA was enacted after CEPA to support this claim.

Although specialized environmental legislation may create a scheme which delimits unreasonable impairment with respect to CEPA actions under § 22a-16, the CEPA

action is independent of the remedies afforded under that legislative scheme even though the regulated activity falls within that scheme. *Waterbury v. Washington*, supra, at 528-29. Consequently, even though the IWWA may provide recourse under its provision for any unauthorized impairment of wetlands, the DEP and the cross claimants are free to pursue the remedies available under CEPA in an independent action for unreasonable impairment of the floodplain forest.

2.

The third special defense posits that the DEP lacks authority to bring a CEPA claim which alleges unreasonable impairment of a floodplain forest. The purported basis for this defense is that the regulation of floodplain activity has been delegated by the state to the East Haddam Inland Wetlands and Watercourses Commission by virtue of § 22a-42.

Section 22a-42(a) declares that it is "the public policy of the state to require municipal regulation of activities affecting the wetlands and watercourses within the territorial limits of the various municipalities . . . ." Section 22a-42(c) mandates that each municipality establish an agency to carry out the dictates of the IWWA.

However, § 22a-16 explicitly confers concurrent authority on any "agency of the state or of a political subdivision thereof" to initiate suit for unreasonable impairment or destruction of "air, water and other natural resources." The airport defendants' argument flies directly in the face of the plain language of § 22a-16, and no other statutory provision nor case law militates against such concurrent authority to sue under CEPA. Therefore, the court finds this special defense meritless.

3.

The fourth special defense is that the felling of trees falls outside the purview of the IWWA, and, therefore, no claim under CEPA is viable. The airport defendants rely on the case of *Avalon Bay Communities, Inc. v. Inland Wetlands Commission*, 266 Conn. 150 (2003), as support for this proposition.

Reliance on *Avalon Bay Communities Inc.*, supra, is misplaced. First, that case was not a CEPA action, but instead it was an appeal from the denial of a local wetlands permit. Second, and more significantly, that case involved the local wetlands agency's attempt to regulate conduct performed outside of wetlands because of the impact of that conduct on the wetlands inhabitants. *Id.*, at 152 and 155. The applicant, in that case, had proposed no activity within the wetland, therefore no permit was required to engage in activity elsewhere. *Id.*

In contrast, the CEPA action in the present litigation is based on the impact of clear-cutting of all woody vegetation growing in a section of wetlands. The holding of *Avalon Bay Communities, Inc.*, supra, is inapposite.

Having determined that the DEP and the cross claimants satisfied their burden of proof under § 22a-16 and that the defendants have failed to demonstrate any valid special defense to this cause of action, the court holds that the clear-cutting at the behest of those defendants constituted a CEPA violation.

IV

REMAINING CROSS CLAIMS OF THE LAND TRUST AND NATURE CONSERVANCY

The Land Trust and Nature Conservancy also plead that the entry onto their land and clear-cutting of the trees and bushes growing there, ordered by Mellon on behalf of the

airport and without their permission, amounted to trespass to land and conversion.

A.

TRESPASS

In order for the cross claimants to prevail on their cross claim of trespass to land, they must prove, by a preponderance of the evidence, that they owned and possessed the 2.5 acres entered into and clear-cut by Evans at the request of Mellon and the airport. An action for trespass is possessory, and one in which title to land is usually only incidentally material. *McCullough v. Waterfront Park Assn., Inc.*, 32 Conn. App. 746, 749 (1993). However, where injunctive relief is sought, as in this case, ownership becomes an essential element of the cross claim. *Id.* The cross claimants can establish constructive possession by proving both title and the absence of exclusive possession in another. *Id.*

In the present case, the parties have stipulated that the Land Trust and Nature Conservancy have title and own the 2.5 acres which are the subject of this suit, and the court finds that no other person or entity held exclusive possession besides these cross claimants. Also, the court has found, as noted above, that Evans entered upon and clear-cut the acreage in question at the request of and on behalf of Mellon and the airport. Thus, the remaining issue to be resolved is whether Evans' entry and clear-cutting was wrongful.

In this regard, it is also undisputed that none of the airport defendants had permission from the cross claimants to enter this area or cut any vegetation and that the entry and cutting was done intentionally. Therefore, unless Mellon or the airport had the right, without permission from the cross claimants, to engage in that conduct on the land of the cross claimants, the actions of Evans between November 29 and December 5, 2000, on behalf of Mellon and the

airport comprised a trespass to land for which Mellon and the airport are liable.

B.

PRESCRIPTIVE EASEMENT

Mellon and the airport claim to have acquired such a right by way of a prescriptive easement.

General Statutes § 47-37 provides that a prescriptive easement may be acquired in land of another if the adverse use of that land "has been continued uninterrupted for fifteen years." The airport is required to prove that it and/or its predecessors in the chain of title of the airport land, as the dominant estate, entered and had cleared trees and brush on the servient estate, the 2.5 acres, under scrutiny, openly, visibly, continuously, and uninterruptedly for fifteen years and under a claim of right. *Roman v. Johnson*, 48 Conn. App. 498, 501 (1998).

"Use under a claim of right simply means without recognition of the rights of the owner of the servient tenement." *Id.* Unlike adverse possession, which requires proof of essential facts by clear and convincing evidence, a prescriptive easement may be proven by a preponderance of the evidence. *Simonds v. Shaw*, 44 Conn. App. 683, 687 (1997). The burden of proof is on the party claiming the benefit of the prescriptive easement. *Reynolds v. Soffer*, 190 Conn. 184, 188 (1983). Also, in Connecticut there is no presumption of permissive use that the party urging the prescriptive easement must overcome. *Id.*

With these principles in mind, the court makes the following additional findings of fact and rulings of law.

On December 3, 1970, the then owners of the properties to the north and south of the tidal brook, including the 2.5 acres in question, entered into a boundary agreement whereby these previous owners of the airport property quitclaimed to the owner of the land containing the 2.5 acres

that are the center of this dispute any "right, title, interest, claim and demand whatsoever" as to the land south of the tidal brook, which property includes the acreage upon which the prescriptive easement is claimed by the airport. As a result of that agreement, if the airport has prescriptive rights to the land south of the tidal brook, those rights must have begun to be acquired only after the date of that boundary agreement, viz. December 3, 1970. This is so because the agreement relinquished any interest, rights, or claims "whatsoever" which may have existed previously regarding that property.

Later, on June 7, 1978, the president of the airport, in a letter to the CT DOT Bureau of Aeronautics, acknowledged that the airport had no authority or right to remove or trim trees located south of the tidal brook without first obtaining the permission of the owner of that land. The court finds that, as of June 7, 1978, no entry upon and cutting of trees or brush was conducted, as of right, by the airport on the 2.5 acres in question.

Additionally, General Statutes § 47-27(b) states that "[n]o length of possession, use or occupancy of land belonging to a nonprofit land-holding organization shall create or continue any right in or to such land." (Emphasis added.) A "nonprofit land-holding organization" is defined by that section to include any nonprofit, nonstock corporation having as a principal purpose "the conservation and preservation of land." Both the Land Trust and Nature Conservancy come within this definition and have recourse to § 47-27(b) to thwart the acquisition of prescriptive easements over their land. Section 47-27 applies to prescriptive easements as well as to adverse possession claims. *Dalton Enterprises v. Boston and Maine Corp.*, 48 Conn App. 251, 253 (1998).

Left unresolved by our appellate level case law is the breadth of the phrase "create or continue any right in or to such land" (emphasis added). One might inquire whether

that phase means that a prescriptive easement previously acquired is lost if the servient estate is purchased by an entity qualifying for the benefit of § 47-27. Fortunately, this court can address and decide the issues of this case without answering that inquiry.

In *Nigro v. Boston Maine Corp.*, Superior Court, Waterbury J.D ., d.n. 106723 (July 21, 1993), Pittman, J. (9 Conn. L. Rptr. 491), the trial court held that the identical language of § 47-27(a), which affords similar protection to railroad property, cannot divest a prescriptive easement which was acquired before the effective date of that section of the statute, which was enacted in 1905. The court finds Judge Pittman's reasoning persuasive and holds that any prescriptive easement burdening the land in question acquired before the effective date of § 47-27(b) remains extant.

The effective date of § 47-27(b), as announced in P.A. 99-64, was May 27, 1999. The court concludes that the passage of P.A. 99-64, now codified as § 47-27(b), prohibits the acquisition of prescriptive easements on the cross claimant's land after May 27, 1999, but fails to extinguish any prescriptive rights fully gained before that date. Therefore, if the airport has any prescriptive easement to enter upon and cut vegetation south of the tidal brook on land owned and possessed by the cross claimants, that easement must have been acquired, if at all, by the passage of the requisite fifteen years entirely during the interval between June 7, 1978, and May 27, 1999.

In their post-trial brief, the Land Trust and Nature Conservancy contend that the execution of the boundary agreement forever disabled the owners of the airport property from acquiring any prescriptive rights regarding property south of the tidal brook. These cross claimants argue that the holding of *Crandall v. Gould*, 244 Conn. 583 (1998), mandates this conclusion. The court disagrees.

In *Crandall*, supra, a permanent injunction had issued in 1960 enjoining the claimants from using a private right of way. The claimants attempted to gain use of this easement, prescriptively, by repeated violations of the permanent injunction. Our Supreme Court rebuffed such an attempt and held that one who violates a court order cannot come to court expecting to obtain relief based on that violation. *Id.*, at 592. The Court refused to condone such contempt of court. *Id.*, at 593.

The facts of the present case are patently dissimilar. The airport defendants have violated no court order. While entering the cross claimants' land may contravene the rights to exclusive possession conveyed by the boundary agreement, every prescriptive easement is similarly acquired. If the execution of a deed foreclosed the possibility of a later-acquired prescriptive easement, it is difficult to envision when such an easement could ever be obtained.

The court finds that the owner of the airport property did acquire, prescriptively, some rights to enter and cut trees on the cross claimant's land south of the tidal brook during this interval. Sometime in 1983, Arthur D'Onofrio purchased the airport. Periodically throughout his ownership, which ended when he sold the property to Goodspeed Airport, LLC, in July 1999, D'Onofrio had his employees or agents trim or cut down some trees growing in the 2.5-acre section in question. He never sought permission from the landowners of that property or anyone else to engage in this activity.

The timing of the trimming or cutting was precipitated either by an inspection report authorized by the DOT, which had detected trees obstructing safe air navigation or, more commonly, by pilots complaining about these natural obstacles to take off and landing corridors. The nature and extent of the cutting and trimming by D'Onofrio varied from the mere pruning of the tops of taller tress to the

severance at ground level of certain trees. Sometimes only a few trees were affected, and, at other times, several trees were felled. As mentioned above, such activity occurred only as regularly as the growth of the trees dictated through official inspection or pilot complaint.

The cutting was always done openly, in daylight, and in a conspicuous manner involving the use of chainsaws. The effect of this periodic trimming and thinning on the maximum height of the tree canopy in the 2.5-acre section was apparent as can be seen in photographs of the area during D'Onofrio's ownership. The floodplain forest to the east and west of the subject area was perceptibly higher than the 2.5-acre section. This cutting was performed as regularly, continuously, and uninterruptedly as one would reasonably expect given the fact that the need for such cutting varied depending on tree regrowth rates. The circumstance that the actual entry and cutting was intermittent causes no gap in the running of the fifteen-year statutory period. *Simonds v. Shaw*, supra. The nature of the use demands that such be the case.

The court concludes that the dominant estate, the airport property, acquired a prescriptive easement to go onto the 2.5-acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway. This adverse activity was done openly and continuously from 1983 to July 1999 and without recognition of the rights or interests of the possessor of this land.

C.

The court next determines whether the extent of that prescriptive was exceeded by or compatible with the clear-cutting which transpired between November 29 and December 5, 2000.

A prescriptive easement is more limited than an easement obtained by grant. *Gioielli v. Mallard Cove*

Condominium Ass'n, Inc., 37 Conn. App. 822, 831 (1995). The usage which creates the prescriptive easement "limits and qualifies it." *Id.* Prescriptive easements must impose as little burden on the servient estate as the purposes of the easement will reasonably permit. *Id.* One cannot expand the nature and extent of such an easement so as to increase unreasonably the imposition on the subordinate real estate.

If it is reasonable to assume that the increase in usage would have provoked the owner of the servient property to take action to interrupt the usage had the intensification occurred during the prescriptive period, the expanded usage exceeds the prescriptive easement acquired. *McCullough v. Waterfront Park Ass'n, Inc.*, supra, at 756. An increase in frequency of use can constitute such a provocation. *Id.*, at 756-57.

In the present case, it is abundantly obvious that clear-cutting every tree and woody-stemmed bush in the 2.5-acre site is a usage so dramatically different in extent than the felling of several trees every few years which occurred during the prescriptive period from 1983 to 1998, that one would reasonably expect the Land Trust and Nature Conservancy or any owner of the 2.5 acres to react, as well they did, to prevent such usage from happening again. The clear-cutting of the 2.5 acres was unreasonable conduct far beyond the right to cut the occasional protruding limb or tree, as had occurred during the prescriptive period. It was unforeseeable to the owners of the servient property that the periodic trimming and severing of a few or even several trees at a time, during the statutory fifteen years, would intensify to the level of stripping 2 .5 acres of all woody vegetation. Prescriptive rights confer no privilege to engage in unforeseeable acts which go beyond the activity conducted during the prescriptive years. *Gioielli v. Mallard Cove Condominium Assn, Inc.*, supra, at 832-33. Therefore, the airport defendants are liable for trespass to land for the clear-cutting activity described above.

D.

CONVERSION

The Land Trust and Nature Conservancy also allege that the clear-cutting constituted a conversion. The tort of conversion only applies to the wrongful appropriation of personal property. *Hartlin v. Cody*, 144 Conn. 499, 508 (1957). Real property includes land and the plants growing on that land. *McKelvey v. Creevey*, 72 Conn. 464, 467 (1900). While the severing of plants may be a trespass to land, as found in Section IV.C of this memorandum, it fails to embrace conversion, and the court decides this count of the cross-complaint in favor of the airport defendants.

E.

CUTPA

In their fifth cross claim, the Land Trust and Nature Conservancy allege a CUTPA violation. These parties have failed to brief this claim, and it is considered abandoned.

V.

CROSS CLAIMS OF THE AIRPORT DEFENDANTS

In X07-CV01-0076812, the airport and Mellon have filed cross claims against the Land Trust and Nature Conservancy. These cross claims sound in trespass, conversion, negligence, negligent nuisance, absolute nuisance, and indemnification. The essence of these claims is that the Land Trust and Nature Conservancy have allowed trees located on their land to grow into the approach slope above their property and refused to provide "unqualified access" to the airport to cut these trees.

Although the court has found that the airport has a limited prescriptive easement to enter the property of the Land Trust and Nature Conservancy and cut certain trees, this easement imposes no burden upon the owners of the

servient estate to do the cutting for the airport. The Land Trust and Nature Conservancy have merely allowed their property to remain in a natural state. It would serve no useful purpose to go beyond stating that these cross claims are devoid of factual support and legal merit.

VI.

REMEDIES

A.

As explicated in Section I of this memorandum, in X07-CV01-0076812, the Commission has established entitlement to the remedies afforded by § 22a-44(b). That section allows the court to assess civil penalties of up to $1000 per offense. Each day of a continuing offense is defined under § 22a-44(b) to be a separate offense. That provision also empowers the court to enjoin a continuing violation and order that the violation be corrected or removed. Additional facts are recited to address this issue.

On January 2, 2001, after learning of the clear-cutting, Ventres, by the power granted to him under § 22a-44(a), issued a cease and desist order which prohibited the airport defendants from engaging in any further regulated activity at the site. The order restated the Commission regulations definition of regulated activity which embraces any operation with or use of a wetland involving the removal or depositing of material in or alteration of the site.

In accordance with § 22a-44(a), the Commission scheduled a hearing, within ten days of issuance of the order, regarding whether the cease and desist order ought to remain in effect. However, because a sufficient number of Commission members or alternates recused themselves, no quorum was available on the date of the hearing. The hearing was never rescheduled. The Commission has taken no action with respect to the cease and desist order.

Section 22a-44(a) obligates the Commission to hear the facts and, within ten days of the completion of the hearing, notify the subject of the order that the original order remains in effect, that a revised order is in effect, or that the order has been withdrawn. That section states further that the "original order shall be effective upon issuance and shall remain in effect until the agency affirms, revises or withdraws the order."

The court holds that the original cease and desist order issued by Ventres in January 2001 remains in effect because that order was never acted upon by the Commission. That order prevents the airport defendants from implementing any corrective or remedial plan because such action would necessarily involve the removal and deposition of material at the site and would alter wetlands, albeit for environmentally beneficial purpose. Under these circumstances, the court cannot view the inaction of the airport defendants, after the date of the cease and desist order, as a continuing violation for purposes of assessing a civil penalty.

The court assesses against the airport defendants, jointly and severally, a civil penalty, under § 22a-44(b), of $500 per day for the thirty-five days from November 29, 2000 to January 2, 2001, the date the cease and desist order issued. The total civil penalty, therefore, equals $17,500, which is ordered to be paid to the DEP, as required by that subsection, within thirty days of the filing of this memorandum. The court also enjoins the Goodspeed Airport, LLC, and Timothy Mellon from engaging in any regulated activity on the land south of the tidal brook without obtaining a permit or approval from the Commission beforehand. This applies to each instance of activity unless the Commission issues a blanket permit.

Because the court has not assessed penalties after the date the cease and desist order issued, it is not necessary to

address the fourth special defense asserting that the plaintiffs failed to mitigate their damages.

The court will address the issues regarding an award of attorneys fees after a hearing at a later date.

The court declines to order any corrective or remedial action for two reasons. First, the land upon which such action would occur is owned by others. Second, the court will be issuing orders under the CEPA claims bearing on this issue.

B.

As determined in Section III, the DEP and the Land Trust and Nature Conservancy have proven a CEPA violation under § 22a-16. General Statutes § 22a-16a provides that "in lieu of any other penalties, damages or costs, or in addition to a reduced penalty, damages or costs awarded" the court "may order the defendant ... (3) to make financial contributions to an academic or government-funded research project related to environmental protection or conservation of natural resources ...."

The court exercises the prerogative afforded by § 22a-16a(3) and, in lieu of other penalties, damages, or costs, orders the defendants to make a financial contribution of $50,000 to an academic or government-funded research project related to environmental protection or conservation of natural resources, which recipient will be identified by the DEP. The payment will be made within six months of the date the DEP notifies the court and the parties of the entity receiving the contribution.

The court chose this option rather than ordering the adoption of a particular restoration or remediation plan for the following reasons. The violators are not the landowners, and the history of a lack of cooperation among the parties makes it difficult to reach any consensus regarding the best method to accomplish the goals of restoration and/or

remediation. Indeed, no party proposes a replication of the conditions which existed before the clear-cutting occurred. That situation results because invasive species, such as ailanthus trees, had already established themselves at this site for many years, and it is highly desirable ecologically to eradicate such invaders and replace them with native species. Also, any plan may involve replanting, the use of deer fencing, the application of herbicides against foreign species, etc. which actions are regulated activity requiring approval of the Commission after a hearing. The financial contribution solution appears to the court to be the most practical, reasonable, and balanced remedy to apply under all the circumstances of this case. It is expected that the DEP will identify a recipient connected to the Chapman's Pond preserve, if possible.

Again, the issues of an amount of attorneys fees and expenses will be addressed after a hearing at a later date.

C.

Next, the court determines the appropriate damages arising from the trespass cross claim of the Land Trust and Nature Conservancy. The cross claimants submitted no evidence as to the value of the severed trees as cut wood nor as to any diminution of the value of the land proximately caused by the clear-cutting. Instead, the cross claimants, at trial, urged the court to award treble damages under General Statutes § 52-560 based on the replacement value of the trees.

The cross claimants concede that their claim for damages is controlled by the holding in *Stanley v. Lincoln*, 75 Conn. App. 781 (2003). That case reaffirmed the long-standing interpretation that § 52-560 embodies the common-law measure of damages for the cutting down of trees on another's land. *Id.*, at 785-86. Damages recoverable for the unlawful felling of trees, under § 52-560, are either the value of the trees as cut wood, such as for lumber or firewood, or

the diminishment in value of the property which resulted from the cutting. *Id.* Replacement cost is an improper measure of damage. *Id.*, at 789. Remedies, other than that provided under § 52-560, for the unauthorized severing of trees will not be implied. *Id.*, at 790.

Essentially, the cross claimants want this court to abrogate the measure of damages principles recently reiterated in *Stanley v. Lincoln*, supra, because they wish to make "new law." Any decision to abandon recent precedent is the function of an appellate tribunal and not that of the trial court.

In the absence of any evidence regarding the proper measure of damages, the cross claimants are entitled to recover only nominal damages for the "mere unlawful entry upon land." *Id.*, at 785. Accordingly, the court awards nominal damages of one dollar on the trespass cross claim.

The court does, however, enjoin the Goodspeed Airport, LLC, and Timothy Mellon and their agents or employees from entering the cross claimant's land, without the owner's consent, except as is consistent with the prescriptive easement usage which the court has found to exist in Sections IV.B and IV.C of this memorandum.

APPENDIX D

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17280

JAMES VENTRES ET AL.

v.

GOODSPEED AIRPORT, LLC, ET AL. : October 25, 2005

ORDER

The motion of the Defendants-Appellants Goodspeed Airport, LLC, Timothy Mellon and Timothy Evans, filed September 9, 2005, for reconsideration, having been presented to the Court, it is hereby ORDERED denied.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: October 26, 2005

APPENDIX E

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17280

JAMES VENTRES ET AL.

v.

GOODSPEED AIRPORT, LLC, ET AL.

: November 29, 2005

ORDER

The motion of the Defendants, Goodspeed Airport, LLC, Timothy Mellon and Timothy Evans, filed November 7, 2005, for stay of execution, having been presented to the Court, it is hereby ORDERED granted until the expiration of the time to petition to the United States Supreme Court or, if a petition is filed, until that Court has taken action in this case, either by a denial of the petition for certiorari or, if applicable, by a decision on the merits.

Katz and Vertefeuille, JJ., did not participate in the consideration or decision of the motion.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: November 29, 2005

APPENDIX F

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17281

CONNECTICUT DEPARTMENT
OF ENVIRONMENTAL PROTECTION
v.
TIMOTHY MELLON ET AL. October 25, 200[5]

ORDER

The motion of the defendants-appellants Timothy Mellon and Goodspeed Airport, LLC, filed September 9, 2005, for reconsideration, having been presented to the Court, it is hereby ORDERED denied.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: October 26, 2005

APPENDIX G

SUPREME COURT
STATE OF CONNECTICUT

No. SC 17281

CONNECTICUT DEPARTMENT
OF ENVIRONMENTAL PROTECTION

v.

TIMOTHY MELLON ET AL. : November 29, 2005

ORDER

The motion of the defendants, Goodspeed Airport, LLC and Timothy Mellon, filed November 7, 2005, for stay of execution, having been presented to the Court, it is hereby ORDERED granted until the expiration of the time to petition to the United States Supreme Court or, in a petition is filed, until that Court has taken action in this case, either by a denial of the petition for certiorari or, if applicable, by a decision on the merits.

Vertefeuille, J., did not participate in the consideration or decision of the motion.

By the Court,

/s/ Michele T. Angers
Chief Clerk

Notice Sent: November [2]9, 2005

APPENDIX H

Federal Aviation Statutes and Regulations

49 U.S.C. § 40102. Definitions

(a) General Definitions.—In this part—

(30) "navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations under this subpart and subpart III of this part, including airspace needed to ensure safety in the takeoff and landing of aircraft.

49 U.S.C. § 40103. Sovereignty and use of airspace

(a) Sovereignty and public right of transit.—(1) The United States Government has exclusive sovereignty of airspace of the United States.

(2) A citizen of the United States has a public right of transit through the navigable airspace.

(b) Use of airspace.—(1) The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace. The Administrator may modify or revoke an assignment when required in the public interest.

(2) The Administrator shall prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for—

(A) navigating, protecting, and identifying aircraft;

(B) protecting individuals and property on the ground;

(C) using the navigable airspace efficiently; and

(D) preventing collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 41713. Preemption of authority over prices, routes, and service

(b) Preemption.—(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce any law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

* * * * *

Code of Federal Regulations

Title 14 — Aeronautics and Space

Chapter 1 — Federal Aviation Administration, Department of Transportation

PART 77 — OBJECTS AFFECTING NAVIGABLE AIRSPACE

Subpart A — General

§ 77.1 Scope.

This part:

(a) Establishes standards for determining obstructions in navigable airspace;

(b) Sets forth the requirements for notice to the Administrator of certain proposed construction or alteration;

(c) Provides for aeronautical studies of obstructions to air navigation, to determine their effect on the safe and efficient use of airspace;

(d) Provides for public hearings on the hazardous effect of proposed construction or alteration on air navigation; and

(e) Provides for establishing antenna farm areas.

§ 77.2 Definition of terms.

For the purpose of this part:

Airport available for public use means an airport that is open to the general public with or without a prior request to use the airport.

A seaplane base is considered to be an airport only if its sea lanes are outlined by visual markers.

Nonprecision instrument runway means a runway having an existing instrument approach procedure utilizing air navigation facilities with only horizontal guidance, or area type navigation equipment, for which a straight-in nonprecision instrument approach procedure has been approved, or planned, and for which no precision approach facilities are planned, or indicated on an FAA planning document or military service military airport planning document.

Precision instrument runway means a runway having an existing instrument approach procedure utilizing an Instrument Landing System (ILS), or a Precision Approach Radar (PAR). It also means a runway for which a precision approach system is planned and is so indicated by an FAA approved airport layout plan; a military service approved military airport layout plan; any other FAA planning document, or military service military airport planning document.

Utility runway means a runway that is constructed for and intended to be used by propeller driven aircraft of 12,500 pounds maximum gross weight and less.

Visual runway means a runway intended solely for the operation of aircraft using visual approach procedures, with no straight-in instrument approach procedure and no instrument designation indicated on an FAA approved airport layout plan, a military service approved military airport layout plan, or by any planning document submitted to the FAA by competent authority.

§ 77.3 Standards.

(a) The standards established in this part for determining obstructions to air navigation are used by the Administrator in:

(1) Administering the Federal-aid Airport Program and the Surplus Airport Program;

(2) Transferring property of the United States under section 16 of the Federal Airport Act;

(3) Developing technical standards and guidance in the design and construction of airports; and

(4) Imposing requirements for public notice of the construction or alteration of any structure where notice will promote air safety.

(b) The standards used by the Administrator in the establishment of flight procedures and aircraft operational limitations are not set forth in this part but are contained in other publications of the Administrator.

§ 77.5 Kinds of objects affected.

This part applies to:

(a) Any object of natural growth, terrain, or permanent or temporary construction or alteration, including equipment or materials used therein, and apparatus of a permanent or temporary character; and

(b) Alteration of any permanent or temporary existing structure by a change in its height (including appurtenances), or lateral dimensions, including equipment or materials used therein.

Subpart C—Obstruction Standards

§ 77.21 Scope.

(a) This subpart establishes standards for determining obstructions to air navigation. It applies to existing and proposed manmade objects, objects of natural growth, and terrain. The standards apply to the use of navigable airspace by aircraft and to existing air navigation facilities, such as an air navigation aid, airport, Federal airway, instrument approach or departure procedure, or approved off-airway route. Additionally, they apply to a planned facility or use, or a change in an existing facility or use, if a proposal therefor is on file with the Federal Aviation Administration or an appropriate military service on the date the notice required by § 77.13(a) is filed.

(b) At those airports having defined runways with specially prepared hard surfaces, the primary surface for each such runway extends 200 feet beyond each end of the runway. At those airports having defined strips or pathways that are used regularly for the taking off and landing of aircraft and have been designated by appropriate authority as runways, but do not have specially prepared hard surfaces, each end of the primary surface for each such runway shall coincide with the corresponding end of the runway. At those airports, excluding seaplane bases, having a defined landing and takeoff area with no defined pathways for the landing and taking off of aircraft, a determination shall be made as to which portions of the landing and takeoff area are regularly used as landing and takeoff pathways. Those pathways so determined shall be considered runways and an appropriate primary surface as

defined in § 77.25(c) will be considered as being longitudinally centered on each runway so determined, and each end of that primary surface shall coincide with the corresponding end of that runway.

(c) The standards in this subpart apply to the effect of construction or alteration proposals upon an airport if, at the time of filing of the notice required by § 77.13(a), that airport is—

(1) Available for public use and is listed in the Airport Directory of the current Airman's Information Manual or in either the Alaska or Pacific Airman's Guide and Chart Supplement; or

(2) A planned or proposed airport or an airport under construction, that is the subject of a notice or proposal on file with the Federal Aviation Administration, and, except for military airports, it is clearly indicated that that airport will be available for public use; or,

(3) An airport that is operated by an armed force of the United States.

§ 77.23 Standards for determining obstructions.

(a) An existing object, including a mobile object, is, and a future object would be, an obstruction to air navigation if it is of greater height than any of the following heights or surfaces:

(1) A height of 500 feet above ground level at the site of the object.

(2) A height that is 200 feet above ground level or above the established airport elevation, whichever is higher, within 3 nautical miles of the established reference point of an airport, excluding heliports, with its longest runway more than 3,200 feet in actual length, and that height increases in the proportion of 100 feet for each additional

nautical mile of distance from the airport up to a maximum of 500 feet.

(3) A height within a terminal obstacle clearance area, including an initial approach segment, a departure area, and a circling approach area, which would result in the vertical distance between any point on the object and an established minimum instrument flight altitude within that area or segment to be less than the required obstacle clearance.

(4) A height within an en route obstacle clearance area, including turn and termination areas, of a Federal airway or approved off-airway route, that would increase the minimum obstacle clearance altitude.

(5) The surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.25, § 77.28, or § 77.29. However, no part of the take-off or landing area itself will be considered an obstruction.

(b) Except for traverse ways on or near an airport with an operative ground traffic control service, furnished by an air traffic control tower or by the airport management and coordinated with the air traffic control service, the standards of paragraph (a) of this section apply to traverse ways used or to be used for the passage of mobile objects only after the heights of these traverse ways are increased by:

(1) Seventeen feet for an Interstate Highway that is part of the National System of Military and Interstate Highways where overcrossings are designed for a minimum of 17 feet vertical distance.

(2) Fifteen feet for any other public roadway.

(3) Ten feet or the height of the highest mobile object that would normally traverse the road, whichever is greater, for a private road.

(4) Twenty-three feet for a railroad, and,

(5) For a waterway or any other traverse way not previously mentioned, an amount equal to the height of the highest mobile object that would normally traverse it.

§ 77.25 Civil airport imaginary surfaces.

The following civil airport imaginary surfaces are established with relation to the airport and to each runway. The size of each such imaginary surface is based on the category of each runway according to the type of approach available or planned for that runway. The slope and dimensions of the approach surface applied to each end of a runway are determined by the most precise approach existing or planned for that runway end.

(a) *Horizontal surface.* A horizontal plane 150 feet above the established airport elevation, the perimeter of which is constructed by swinging arcs of specified radii from the center of each end of the primary surface of each runway of each airport and connecting the adjacent arcs by lines tangent to those arcs. The radius of each arc is:

(1) 5,000 feet for all runways designated as utility or visual;

(2) 10,000 feet for all other runways. The radius of the arc specified for each end of a runway will have the same arithmetical value. That value will be the highest determined for either end of the runway. When a 5,000-foot arc is encompassed by tangents connecting two adjacent 10,000-foot arcs, the 5,000-foot arc shall be disregarded on the construction of the perimeter of the horizontal surface.

(b) *Conical surface.* A surface extending outward and upward from the periphery of the horizontal surface at a slope of 20 to 1 for a horizontal distance of 4,000 feet.

(c) *Primary surface.* A surface longitudinally centered on a runway. When the runway has a specially prepared hard

surface, the primary surface extends 200 feet beyond each end of that runway; but when the runway has no specially prepared hard surface, or planned hard surface, the primary surface ends at each end of that runway. The elevation of any point on the primary surface is the same as the elevation of the nearest point on the runway centerline. The width of a primary surface is:

(1) 250 feet for utility runways having only visual approaches.

(2) 500 feet for utility runways having nonprecision instrument approaches.

(3) For other than utility runways the width is:

(i) 500 feet for visual runways having only visual approaches.

(ii) 500 feet for nonprecision instrument runways having visibility minimums greater than three-fourths statute mile.

(iii) 1,000 feet for a nonprecision instrument runway having a nonprecision instrument approach with visibility minimums as low as three-fourths of a statute mile, and for precision instrument runways.

The width of the primary surface of a runway will be that width prescribed in this section for the most precise approach existing or planned for either end of that runway.

(d) *Approach surface.* A surface longitudinally centered on the extended runway centerline and extending outward and upward from each end of the primary surface. An approach surface is applied to each end of each runway based upon the type of approach available or planned for that runway end.

(1) The inner edge of the approach surface is the same width as the primary surface and it expands uniformly to a width of:

(i) 1,250 feet for that end of a utility runway with only visual approaches;

(ii) 1,500 feet for that end of a runway other than a utility runway with only visual approaches;

(iii) 2,000 feet for that end of a utility runway with a nonprecision instrument approach;

(iv) 3,500 feet for that end of a nonprecision instrument runway other than utility, having visibility minimums greater than three-fourths of a statute mile;

(v) 4,000 feet for that end of a nonprecision instrument runway, other than utility, having a nonprecision instrument approach with visibility minimums as low as three-fourths statute mile; and

(vi) 16,000 feet for precision instrument runways.

(2) The approach surface extends for a horizontal distance of:

(i) 5,000 feet at a slope of 20 to 1 for all utility and visual runways;

(ii) 10,000 feet at a slope of 34 to 1 for all nonprecision instrument runways other than utility; and,

(iii) 10,000 feet at a slope of 50 to 1 with an additional 40,000 feet at a slope of 40 to 1 for all precision instrument runways.

(3) The outer width of an approach surface to an end of a runway will be that width prescribed in this subsection for the most precise approach existing or planned for that runway end.

(e) *Transitional surface.* These surfaces extend outward and upward at right angles to the runway centerline and the runway centerline extended at a slope of 7 to 1 from the sides of the primary surface and from the sides of the approach surfaces. Transitional surfaces for those portions

of the precision approach surface which project through and beyond the limits of the conical surface, extend a distance of 5,000 feet measured horizontally from the edge of the approach surface and at right angles to the runway centerline.

* * * * *

Advisory Circular No. 150/5300-13

Chapter 2. AIRPORT GEOMETRY

* * *

211. OBJECT CLEARING CRITERIA. Safe and efficient operations at an airport require that certain area on an near the airport be clear of objects or restricted to objects with a certain function, composition, and/or height. The object clearing criteria subdivides the 14 CFR Part 77, Subpart C, airspace and the object free area (OFA) ground area by type of objects tolerated within each subdivision.

a. Standards. Object clearance requirements are as follows:

* * *

(6) 14 CFR Part 77 Obstructions to Air Navigation. Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise. To determine otherwise, the FAA must find no substantial adverse effect as defined in Order 7400.2, Procedures for Handling Airspace Matters, Chapter 7, Evaluating Aeronautical Effect, Section 1, General. The FAA, normally, limits aeronautical studies of existing objects to obstructions to air navigation which are not included in the criteria cited in paragraphs 211a(1) though (5).

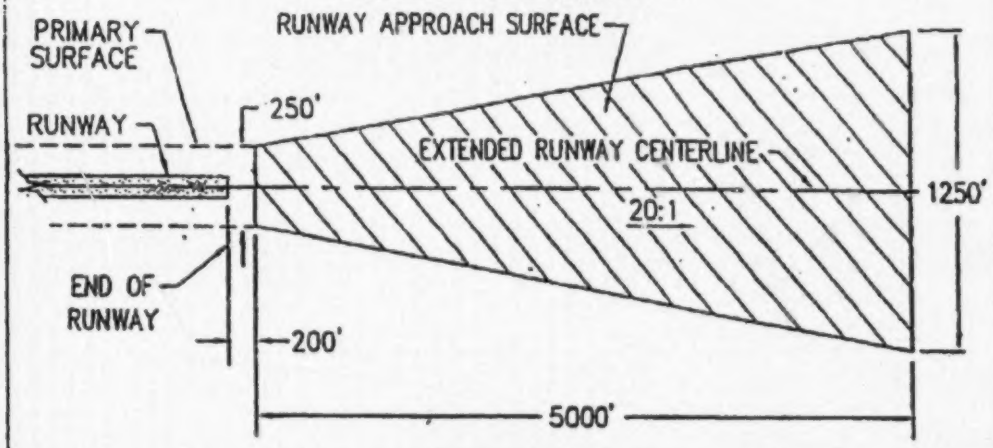
212. RUNWAY PROTECTION ZONE (RPZ). The RPZ's function is to enhance the protection of people and property on the ground. This is achieved through airport owner control over RPZs. Such control includes clearing RPZ areas (and maintaining them clear) of incompatible objects and activities. Control is preferably exercised through the acquisition of sufficient property interest in the RPZ.

a. Standards.

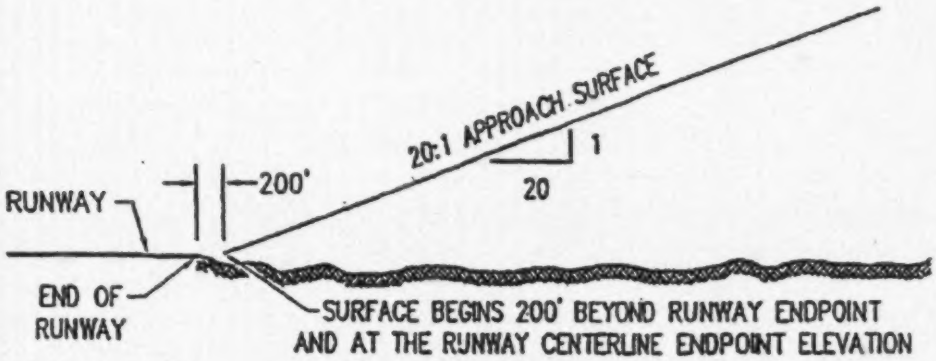
(1) RPZ Configuration/Location. The RPZ is trapezoidal in shape and centered about the extended runway centerline. The controlled activity area and a portion of the Runway OFA are the two components of the RPZ (see figure 2-3). The RPZ dimension for a particular runway end is a function of the type of aircraft and approach visibility minimum associated with that runway end. Table 204 provides standard dimensions for RPZs. Other than with a special application of declared distances, the RPZ begins 200 feet (60m) beyond the end of the area usable for takeoff or landing. With a special application of declared distances, see Appendix 14, separate approach and departure RPZs are required for each runway end.

RUNWAY APPROACH SURFACE FOR

A "UTILITY" RUNWAY WITH A "VISUAL" APPROACH AND A 250' WIDE PRIMARY SURFACE



PLAN VIEW



SIDE VIEW

RUNWAY APPROACH SURFACE: A SLOPING TRAPEZOIDAL PLANE LONGITUDINALLY CENTERED ON THE EXTENDED RUNWAY CENTERLINE AND EXTENDING OUTWARD AND UPWARD FROM THE END OF THE RUNWAY PRIMARY SURFACE. THIS SURFACE IS MEANT TO PROVIDE AIRCRAFT AN UNOBSTRUCTED APPROACH PATH AND SHOULD BE FREE OF ANY PENETRATIONS BY OBJECTS EXCEPT FOR FAA APPROVED FRANGIBLE NAVAIDs. THE TERM NAVAIDs INCLUDES ELECTRICAL AND VISUAL AIR NAVIGATION AIDS. LIGHTS, SIGNS, AND THEIR SUPPORTING EQUIPMENT.

UTILITY RUNWAY: A RUNWAY USED BY PROPELLER DRIVEN AIRCRAFT WITH A MAXIMUM CROSS WEIGHT OF 12,500 POUNDS OR LESS.

RUNWAY WITH A VISUAL APPROACH: A RUNWAY INTENDED SOLELY FOR THE OPERATION OF AIRCRAFT USING VISUAL APPROACH PROCEDURES.

Matthew J. Kelly - DOT

Certified By: [signature]

ASI Date: 2-17-04

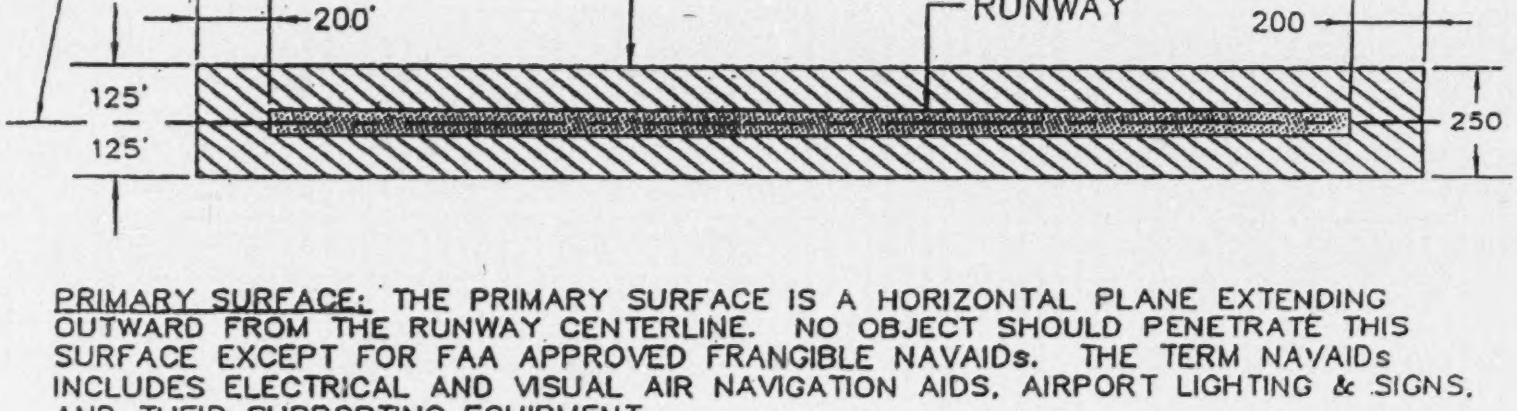
SOURCE: FEDERAL AVIATION REGULATIONS PART 77

Approach Surface

Primary Surface

Certified By: Matthew J. Kelly - DOT
Date: 2-17-04

250' WIDE PRIMARY SURFACE FOR UTILITY RUNWAYS WITH VISUAL APPROACH AT BOTH ENDS



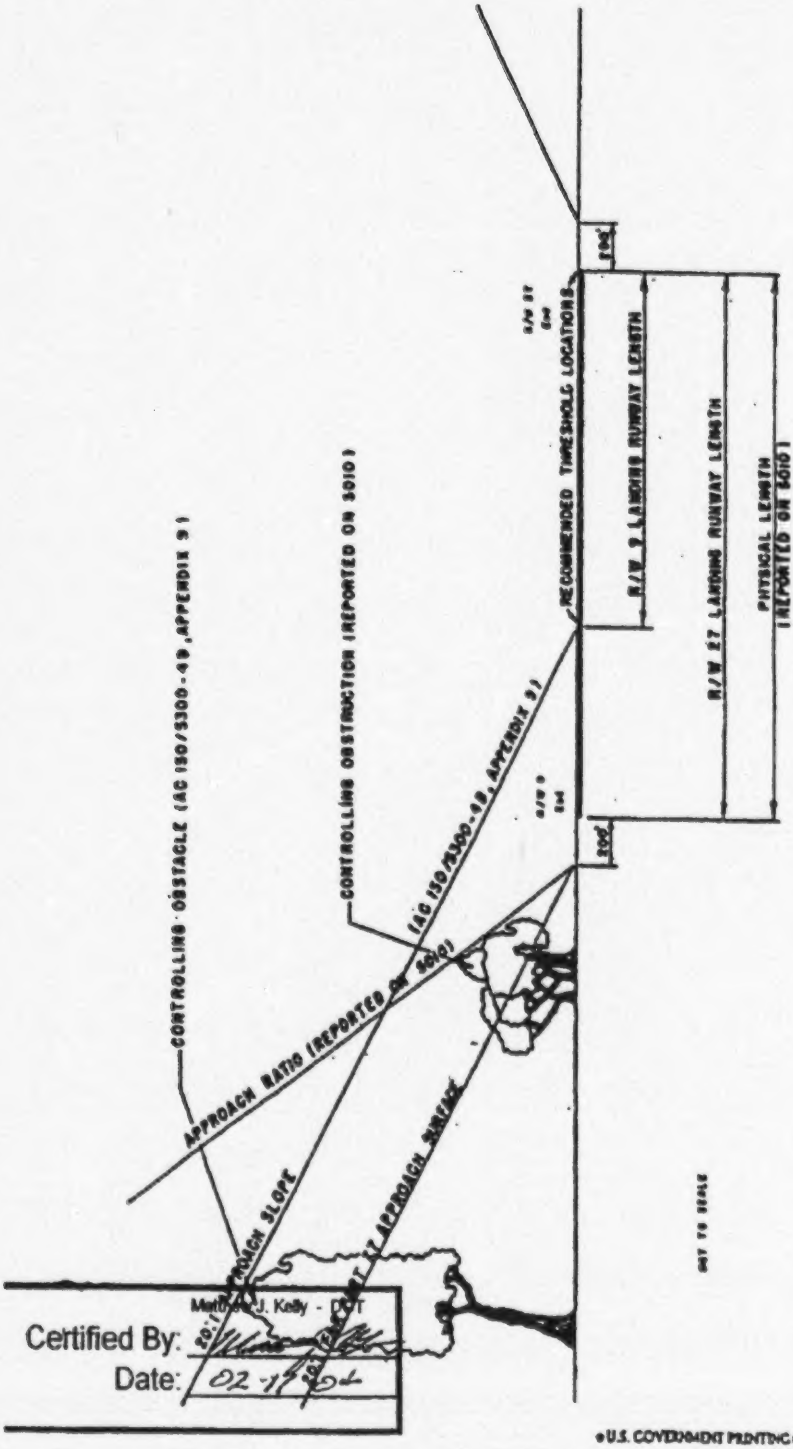
PRIMARY SURFACE: THE PRIMARY SURFACE IS A HORIZONTAL PLANE EXTENDING OUTWARD FROM THE RUNWAY CENTERLINE. NO OBJECT SHOULD PENETRATE THIS SURFACE EXCEPT FOR FAA APPROVED FRANGIBLE NAVAIDs. THE TERM NAVAIDs INCLUDES ELECTRICAL AND VISUAL AIR NAVIGATION AIDS, AIRPORT LIGHTING & SIGNS, AND THEIR SUPPORTING EQUIPMENT

PSVIS

SOURCE: FAA FAR PART 77

APPENDIX 10. METHODOLOGY FOR MEASURING 20:1 LANDING LENGTH

Calculation of Approach Slope



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Supreme Court, U.S.
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No. 05-1088

In The Supreme Court of the United States

GOODSPEED AIRPORT, LLC, *et al.*,

Petitioners,

v.

JAMES VENTRES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the United States Supreme Court should exercise its certiorari jurisdiction where the Petitioner claims federal preemption but Petitioner's counsel below conceded that there is no preemption, the airport in question lacks the property right to remove the trees in question, and the aviation regulations in question provide for compliance without the need to remove trees.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondents, the East Haddam Land Trust and The Nature Conservancy, state that they have no parent corporations and that no publicly traded companies own 10% or more of its stock.

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COUNTER-STATEMENT OF THE CASE

This case arose because the Petitioners clear-cut to the ground some 2.6 acres of trees to the south of Goodspeed Airport in East Haddam, Connecticut. The 2.6 acres of forest at the heart of the litigation are owned by the East Haddam Land Trust and The Nature Conservancy (collectively, the "Land Trusts"). The land is part of a significant natural preserve surrounding Chapman Pond. *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 111 (2005). A variety of litigation arose from the cutting. *See, e.g., Goodspeed Airport, LLC v. East Haddam Land Trust, Inc.*, No. 3:01cv408, 2005 U.S. Dist. LEXIS 11558 (D. Conn. June 13, 2005) (dismissing airport's claim of due process violation), *aff'd*, 2006 U.S. App. LEXIS 2180 (2d Cir. Jan. 27, 2006).

The litigation which is the subject of the Petition arose from two cases filed in the Connecticut State Courts. In the first case, the East Haddam Inland Wetlands and Watercourses Commission (the "IWWC") brought claims under Connecticut's Wetlands statute, Conn. Gen. Stat. § 22a-36, *et seq.*, seeking restoration of the affected property and civil penalties. The second action was brought by the Connecticut Department of Environmental Protection (the "DEP") under the Connecticut Environmental Protection Act, Conn. Gen. Stat. § 22a-16, *et seq.* ("CEPA"). The Land Trusts were made defendants to each of these two cases, which were tried together, since both the IWWC and DEP were seeking to have the Land Trusts' property restored.

In the litigation that was brought by the IWWC, the Petitioners and the Land Trusts filed a variety of cross-claims. For purposes of the Petition, the relevant

cross-claims were the ones brought by the Land Trusts which sounded in CEPA and in trespass. The Land Trusts prevailed on their CEPA claim and were awarded the same relief awarded to the DEP. *Ventres*, 275 Conn. at 135. CEPA provides for declaratory and equitable relief for the protection of the public trust in the air, water or other natural resources of the state from unreasonable pollution, impairment or destruction. Conn. Gen. Stat. § 22a-16.

In connection with the trespass claim, the trial court found that the Petitioners have a limited prescriptive easement to cut or trim trees based on either a runway with an approach slope ranging between 13:1 or 14:1, or a runway with a 340 foot displaced threshold. *Ventres*, 275 Conn. at 125-26. A displaced threshold results from moving the spot at which landings can take place, thereby effectively shortening its length. *Id.* at 123 n.22. Throughout its history, Goodspeed Airport regularly operated with a displaced threshold that was in place apparently as a result of the trees that were growing on the Trust Parties' property. *Id.* at 126 n.24. It was only upon Mr. Mellon's purchase of the airport in 1999 that the displaced threshold ceased to be an option.

During oral argument before the Connecticut Supreme Court, counsel for the Petitioners was asked whether federal law gave the Petitioners a right to cut the trees. He conceded that it did not. *See Ventres*, 275 Conn. at 117; *see also* transcript dated April 14, 2005 of the oral argument before the Connecticut Supreme Court at page 21, appendix at App. 2. Based on the concession of counsel, the Connecticut Supreme Court determined that it did not need to address the question of federal preemption. *Ventres*, 275 Conn. at 132, n.27.

SUMMARY OF ARGUMENT

This Court should not exercise its discretionary jurisdiction over this case, where the Petitioners' claim of federal preemption was not squarely addressed below, because the plaintiffs lack both a property right and a federal duty to undertake the clear-cutting that is the basis of the decisions below.

ARGUMENT

The Petitioners have acknowledged that federal law does not give them the right to cut any trees on the Land Trusts' property; that limited right comes from state property law. *Ventres*, 275 Conn. at 117. In its decision, the Connecticut Supreme Court identified a limited prescriptive easement in favor of the airport to maintain an approach slope to a runway with a 340 foot displaced threshold. *Id.* at 126 n.24. The prescriptive easement does not permit the type of clear-cutting that is the focus of the litigation. *Id.* at 127. Thus, the Petitioners lack any right to clear-cut the property. In the absence of such a right, the Petitioners are, in effect, seeking an advisory opinion from this Court. *See Ventres*, 275 Conn. at 132 n.28 (the Respondents had not claimed below that cutting at the boundaries of the easement would result in a CEPA violation; therefore these claims were not before the court).

In other words, while it is conceivable that there might have been a case for federal preemption if the Petitioners had cut precisely along the prescriptive easement boundary, and the court still returned a judgment in favor of the Land Trusts (and the State of Connecticut)

that the limited cutting constituted "unreasonable impairment" under CEPA, that case is not before this Court. The Petitioners did not limit their cutting to the contours of the easement. Instead, they dramatically and unreasonably exceeded the bounds of the easement, and it was this wanton act which in large measure led to the finding that the cutting was unreasonable and therefore in violation of CEPA. *See Ventres*, 275 Conn. at 136 n.29.

Nonetheless, the Petitioners urge this Court to provide a federal shield for their actions. They do so despite the fact that the decisions of the Connecticut Supreme Court are readily distinguishable from the cases which the Petitioners cite as being contrary on the preemption issue. Both of the cases that the Petitioners cite as conflicting with the decisions below involve actions that the airports involved undertook on property that they owned. *See United States v. City of New Haven*, 496 F.2d 452, 453 (2d Cir. 1974) (New Haven acquired additional land in the Town of East Haven to establish a clear zone at the end of the runway.); *see also Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338, 1339 (9th Cir. 1992) ("The ordinance at issue applies exclusively to a 54-acre parcel of land owned by the Burbank Airport and located within the jurisdiction of the City of Los Angeles.") This fact is in clear contrast to the Petitioners' lack of ownership of the Land Trusts' property, and its lack of the right to clear-cut that property. Since the lack of a property right to clear-cut the trees was the basis for the decisions on the preemption issue, it is difficult to see how the reasoning in the cited questions "stands in stark contrast" to the decisions below, or give rise to a conflict that this Court needs to resolve.

In addition to lacking a property right to cut the trees, the simple fact is that the Petitioners were under no federal duty to cut the trees. (*See, e.g.*, September 28, 1999 Letter from Goodspeed Airport to Connecticut Department of Transportation (Trial Exhibit 220) indicating that the items identified by the Connecticut Department of Transportation had been "corrected" as of Sept. 28, 1999.) (Trust Parties' Connecticut Supreme Court Appendix, hereinafter "Trust App." at 70). The Airport had received no order from either the FAA or the Connecticut Department of Transportation to cut the trees on the Land Trusts' properties. Moreover, the Airport had never been shut down for failure to maintain the glide path set forth in Federal Aviation Regulations ("FAR") Part 77, 14 CFR § 77.25 ("Part 77"). To the contrary, the airport had only three (3) inspection periods out of a total of fourteen (14) inspections over the entire 1978 through 1999 period in which it did not have a non-conforming approach slope, a displaced threshold, or both. Testimony of William DePuy,[1] Mar. 5, 2004, Tr. at 12 (Trust App. at 61).

Notwithstanding the airport's history with respect to its glide path, the Petitioners did not make any attempt to limit their cutting to anything resembling the conditions that had previously existed at the site, or even to the imaginary surfaces set forth in Part 77. Moreover, FAR Part 77 does not actually prohibit obstacles, or require the removal of obstacles. *Catchings v. Glendale*, 743 P.2d 400, 404 (Ariz. Ct. App. 1987). Since the federal regulations that address obstacles at and around airports are advisory, rather than mandatory, they cannot form the basis for preemption.

---

[1] Mr. DePuy was the Petitioners' expert witness designated to testify on FAA matters.

In fact, the testimony of a variety of witnesses, including the Appellants' own aviation expert, showed that the airport did not have to cut the trees in question in order to comply with the FAA mandates and recommendations cited by the Petitioners. The testimony of Petitioners' own FAA expert was that the establishment of a displaced threshold provides one alternative means through which an airport can comply with the glideslope requirements. DePuy, Mar. 5, 2004, Tr. at 20 (Trust App. at 62). A displaced threshold is a method by which an airport can deal with an obstruction which it does not have the power to remove. It involves the painting of lines and symbols on the runway surface, thereby alerting pilots as to what portion of the runway is usable for landing purposes. Essentially it involves the shortening of the runway in one direction. The Petitioners did not dispute below that a displaced threshold was an available option under the Federal Aviation Act, and one that had been historically used at this airport.

Nonetheless, the Petition seems designed to give rise to what amounts to eminent domain powers to the privately owned airport. *See* Petition at 12, n.4. The Petitioners look to avoid civil liability for what they term to be "federally authorized clearing activities" in favor of the paying of compensation. *Id.* However, contrary to Petitioners' claim, there simply are no federally authorized clearing activities. The Petitioners' expert witness (a former Federal Aviation Administration airport inspector) testified that the FAA regulatory scheme would not permit the FAA to order trees to be cut, even if the trees were on the airport's property. DePuy, Mar. 5, 2004, Tr. at 20 (Trust App. at 62). He also testified that local zoning regulations, which are analogous to the environmental regulations at

issue here, control the development of buildings around an airport. *Id.* at 4 (Trust App. at 58); FAA Advisory Circular 150/5190-4A (Trust App. at 72-111). *See also Flowers Mill Assocs. v. United States*, 23 Cl. Ct. 182, 187 (1991) (FAA hazard/no hazard determination made pursuant to FAR Part 77 "has no enforceable legal effect").

The Petitioners claim that the issue of federal preemption arises from two statutory schemes, the Airline Deregulation Act of 1978 and the Federal Aviation Act of 1958. However, the Airline Deregulation Act is an economic deregulation statute which is inapposite with respect to determining issues of preemption related to airline safety. *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 372 (3d Cir. 1998).

Similarly, the Petitioners rely in large measure on FAA Advisory Circular No. 150/5300-13 for its description as to what is permitted within a runway's "approach surface" or "runway protection zone". However, the standards in the Circular are merely recommendations for airports which do not receive federal aid. Advisory Circular 150/5300-13 at 3 (Petitioners' Connecticut Supreme Court Appendix at A-89). Since Goodspeed Airport does not receive federal aid, the Circular does not identify mandates for it.

The Petitioners have acknowledged that federal law does not give them the right to cut any trees on the Land Trusts' property; that limited right comes from state property law. *Ventres*, 275 Conn. at 117. The Connecticut Supreme Court has identified a prescriptive easement that is limited to maintaining a glide path to a runway with a 340 foot displaced threshold. *Id.* at 125-26. The prescriptive easement does not permit the type of clear-cutting

that is the focus of the litigation, and that was part of the basis for the findings that the Petitioners violated CEPA and the Connecticut Wetlands Act.

CONCLUSION

Based on these straightforward findings, the Connecticut Supreme Court determined that it did not have to reach the question of federal preemption. *Id.* at 132-33. Likewise, this Court should decline to exercise its jurisdiction based on the specific facts of this case.

Respectfully submitted,

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APPENDIX

SC17280 TTD	: SUPREME COURT
JAMES VENTRES ET AL.	: STATE OF CONNECTICUT
V.	:
GOODSPEED AIRPORT, LLC, ET AL.	: IN HARTFORD
	: APRIL 14, 2005

BEFORE:

CHIEF JUSTICE WILLIAM SULLIVAN
JUSTICE DAVID M. BORDEN
JUSTICE FLEMMING L. NORCOTT, JR.
JUSTICE RICHARD N. PALMER
JUSTICE PETER T. ZARELLA

APPEARANCES:

FOR THE APPELLANTS:
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FOR THE APPELLEES:
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Joy E. Franklin
Court Monitor

* * *

[21] The case law that's cited in the brief under the Airline Deregulation Act says that the language in that act is very, the print effect is very, very broad, perhaps broader than under the Federal Aviation Act provision cited to the Court.

JUSTICE ZARELLA: On this approach slope that you're talking about, could the FAA order you to cut

down a tree that was, say, 200 feet tall, that obviously protruded into the airspace?

Could the FAA, through the DOT, order you to cut that down?

MR. BASHAW: No, the FAA cannot order you to do that under the Part 77 regulations. What the FAA can do, however, is what they will do is they'll come up, they'll identify a problem.

In fact, what Your Honor is actually getting to is a point that I'll jump to (unclear) the Trial Court's discussion of *Catchings versus Glendale* (phonetic), which basically said that these Part 77 regulations are advisory, they're not enforceable.

Now, it's true. On their face, the Part 77 Regulations do not permit the FAA or the DOT to order the airport owner to remove that tree. However, what could happen is the Connecticut DOT issues an airport a license to operate under, again, authority from the FAA.

In order to have that license and to continue to use that license and have it renewed, you need to have clear

* * *

(4)

No. 05-1088

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In The
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GOODSPEED AIRPORT, LLC, ET AL.,

Petitioners,

v.

JAMES VENTRES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION OF RESPONDENTS JAMES VENTRES AND AND THE EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Connecticut Supreme Court's decision not to address the petitioners' preemption claim, which was prompted by the petitioners' affirmative waiver at oral argument of the factual and legal basis for that claim, together with other significant gaps in the record, makes this an inappropriate case to review the claimed conflict between federal aviation law and state and local land use regulations?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners, who were the defendants below in *Ventres v. Goodspeed Airport, LLC*, 881 A.2d 937 (Conn. 2005), are: Goodspeed Airport, LLC, Timothy Mellon and Timothy Evans.

The respondents in this brief in opposition, who were the plaintiffs below in *Ventres v. Goodspeed Airport, LLC*, *supra*, are: James Ventres and the East Haddam Inland Wetlands and Watercourses Commission.

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STATEMENT OF THE CASE

The record in this case does not present any issues of grave national importance, any conflict among the various Circuit Courts of Appeal, or any pressing public policy questions that require this Court's intervention. In fact, this case involves no properly-preserved federal issues at all because the petitioners affirmatively waived the factual and legal basis for their preemption claim at oral argument before the Connecticut Supreme Court, and because many of the factual and regulatory assertions on which the petitioners rely are either misleading or simply untrue. Even the conflict that the petitioners describe between the decision of the Connecticut Supreme Court and decisions of the Ninth and Second Circuits is more fiction than fact. Therefore, this is not the appropriate case in which to attempt to resolve the hypothetical preemption and policy questions addressed at length in the petition.

The opinion of the Connecticut Supreme Court recites most of the relevant history of this case. Petitioner Timothy Mellon is the sole member of petitioner Goodspeed Airport, LLC, which owns and operates a small airport in East Haddam, Connecticut. The airport is an "[a]irport available for public use" as defined by title 14 of the Code of Federal Regulations, §77.2. Petitioner Timothy Evans is the manager of the airport and has held that position since November of 2003. (Pet. App., 3a).

Goodspeed Airport is bounded on the south by property owned by the respondent East Haddam Land Trust, which, in turn, is bounded on the south by property owned by the respondent The Nature Conservancy. The southern end of the Conservancy Property abuts a small body of water, Chapman Pond. The airport's 2100-foot runway

runs in a north-south direction and is located entirely on airport property; in fact, the southern end of the runway is over 600 feet north of the boundary line between the airport property and the Land Trust property and 1100 feet north of Chapman Pond. (Pet. App., 4a).

In late November and early December 2000, Evans, on orders from Mellon, and without the permission of the Land Trust or Conservancy, cut down every tree, bush, and other piece of woody vegetation on 2.5 acres of the Land Trust and Conservancy properties. This included the destruction of 340 trees (some that were over a century old). This wholesale deforestation took place on land located entirely within a regulated wetlands area, as defined by Conn. Gen. Stat. §22a-38(15), and that was a part of a wildlife refuge and nature preserve along the Connecticut River. (Pet. App., 4a).

The respondents in this opposition are the East Haddam Inland Wetlands and Watercourses Commission – the agency responsible for regulating activity in wetland areas in East Haddam pursuant to Connecticut's Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §22a-28, et seq. – and James Ventres, the Commission's enforcement officer. (Pet. App., 1a, 5a). Following the petitioners' exercise in impromptu forest management, the respondents brought an action alleging that the petitioners had engaged in a regulated activity – clear-cutting the aforementioned hundreds of trees – within a wetlands area without first obtaining a permit, as required by the Act and East Haddam's wetlands regulations. (Pet. App., 4a-5a).

In addition to resolving a host of state law claims, the trial court rejected the petitioners' special defense of preemption. (Pet. App., 71a-74a). The trial court concluded

that federal aviation law and regulations neither expressly nor impliedly preempted state and local land use law requiring a permit prior to conducting a regulated activity in a wetlands area. (Pet. App. 72a-73a). The trial court further concluded that the state and local provisions covered different legal ground from federal aviation law, such that compliance with both was not impossible. (Pet. App., 73a-74a). In addition, the trial court found that the petitioners had a prescriptive easement *only* to *trim* trees above a certain height on the Land Trust and Conservancy properties, and that the petitioners did not have a prescriptive easement to clear-cut those trees. The trial court therefore found that, as a matter of state property law, the petitioners had far exceeded the scope of their easement when they clear-cut the 2.5 acres. (Pet. App., 68a, 86a-91a).

The petitioners did not appeal the trial court's state law easement holding, but did appeal the court's preemption holding. The respondents cross-appealed on various state law issues. (Pet. App., 3a). Prior to argument, the Connecticut Supreme Court transferred the appeal and cross-appeal from the Connecticut Appellate Court to itself pursuant to Conn. Gen. Stat. §51-199(c). (Pet. App., 3a n.4).

A clear understanding of the appellate history of the petitioners' preemption claims is crucial to the proper resolution of their petition. On appeal, both the petitioners and the respondents challenged a number of the trial court's findings and conclusions under state law. However, the petitioners did not challenge the trial court's finding

that they lacked a prescriptive easement to clear-cut[1] the trees; (Pet. App., 25a.); and they do not (indeed, they cannot) make any such claim now. In their brief to the Connecticut Supreme Court, the petitioners appeared to argue that any state property law and land use regulations affecting their right to remove obstructions within navigable airspace were preempted by federal aviation law. (Pet. App. 11a). However, at oral argument before the Court[2], petitioners' counsel, John Bashaw, affirmatively disclaimed any right to remove those obstructions (the trees) under federal law; conceded that the petitioners' right to do so was controlled by state property law governing prescriptive easements; and conceded that preemption principles had no bearing on their claimed right to go onto someone else's property and clear-cut hundreds of trees.

Attorney Bashaw's affirmative waiver was not some mere passing comment or inadvertent remark. To the contrary, Justice David Borden questioned Attorney Bashaw closely and at length about the nature and breadth of his clients' preemption claims:

> JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to do that [clear cutting] are simply pre-empted.
>
> MR. BASHAW: That's correct, Your Honor.

---

[1] The respondents do not claim that Connecticut's Inland Wetlands and Watercourses Act gives them the authority to regulate the trimming of trees – only the sort of clear-cutting that occurred in this case.

[2] The complete transcript of oral argument before the Connecticut Supreme Court is in the respondents' Appendix at pages 1-78.

That –

JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: *Well, no, not true there, Your Honor.*

What our position is, Your Honor, that you do not need an order from the DOT to remove the trees. You do not need a directive from them.

If the trees protrude into the federal glide slope or if they are otherwise located in a runway protection zone *and you otherwise have the property right to remove those trees*, then you don't have to go get permission from the DOT. You do not need permission from the FAA to remove those trees. You can do it because you're trying to maintain air safety.

. . .

JUSTICE BORDEN: [Asking if, under the petitioners' view of preemption, an airport owner could "go out and bulldoze [a] house" if it impeded take-offs and landings, even in the absence of complaints by pilots or an order by the FAA.]

MR. BASHAW: *No, no, I'm not making any claim, Your Honor, that this [preemption] gives you the right to go onto somebody else's property, to go and cut down and remove their trees.*

There's a case, I think it was *City of Westchester* – it's a Connecticut decision – that dealt with abrogation [sic] easements.

I'm not making a claim that the [federal] regulations give you some sort of an easement, a right to go onto somebody else's property, but in

this case, in this case that we had here, we had the property right to go onto that property and clear the trees.

What I'm saying is we had that property right but, yet, the appellees are saying, you still needed to get permission from the Inland-Wetland Commission to remove those trees, and we're going to punish you under CEPA for removing those trees.

Our position is when you have the property right to go do the work, then you cannot have local interference or state interference with that activity.

That's our position, Your Honor.

JUSTICE BORDEN: So your argument for federal preemption, I'm not sure I understand its relation to the easement.

. . .

It seems to me if your pre-emption argument is correct, it's correct irrespective of whether you had an easement to do that. Isn't that so?

MR. BASHAW: Well, let me give you another example, Your Honor.

. . .

JUSTICE BORDEN: But I don't understand how – I thought if you have federal pre-emption because this is airspace, under federal pre-emption local laws are preempted, so even if this had happened in the 14th year instead of the

– well the 16th year[3] so you didn't have an easement by prescription – your federal pre-emption argument would be the same, wouldn't it?

MR. BASHAW: Well, again, Your Honor, I think still pre-emption – *the whole point of pre-emption is if I have the right to remove the trees.*

The airport itself, the airport property itself which is located in a flood plain, all right, the Inland-Wetlands position is I have to go and get their permission to remove the trees that are on my own property.

I could get punished under CEPA, my client could get punished under CEPA for removing those trees on his own property. That's what's pre-empted. You can't let local laws affect the airport's ability to maintain clear space around its airport *when it has the property right to do so.*

I do not claim –

JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's findings of the prescriptive easement?

MR. BASHAW: Certainly, yeah, *it doesn't give me the right. If there's no prescriptive easement, Your Honor –*

. . .

[3] Prescriptive easements arise under Connecticut law after 15 years of uninterrupted use as of right. (Pet. App. 86a.)

JUSTICE BORDEN: – are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.

MR. BASHAW: I cannot remove the trees. *Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA regulations don't permit me to do it.* The DOT can come out and say those trees are a problem, I don't have the right to, *but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.*

If I do have the property right, which is the facts in this case as determined by the Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland.

JUSTICE BORDEN: Well, I understand your argument. It just seems to me a rather novel use of federal pre-emption,

I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing.

I thought pre-emption is pre-emption and it doesn't matter whether you – well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay.

(Resp. App., 24-30) (emphasis added).

In its decision, the Connecticut Supreme Court first affirmed the trial court's decision concerning the existence

and limited scope of the prescriptive easement. (Pet. App., 17a-27a.) Then, in clear reliance on the petitioners' explicit disavowal of their preemption claim, the Court held:

> The airport defendants appear to argue in their brief that, because the federal government has exclusive jurisdiction over navigable airspace, they could remove obstructions within the navigable airspace without regard to either state property law or state and local land use regulations. At oral argument before this court, however, they clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right. See *Westchester v. Greenwich*, 745 F. Supp. 951, 955 (S.D.N.Y. 1990). . . .

(Pet. App., 11a). The Court then explained that it would not address the petitioners' preemption claim because

> [i]f the [petitioners] had no cause of action against the land trust defendants to require them to clear-cut the land under federal law; see *Westchester v. Greenwich*, supra, 745 F. Supp. at 955; they had no right under federal law to conduct such an activity themselves. Accordingly, we conclude that, *under the [petitioners'] own reasoning*, they had no right under federal law to clear-cut the trees in the absence of a right to do so under state property law. In light of the trial court's unchallenged determination that the [petitioners] had no such property right, we conclude that *we need not address their claim that, if*

> *they had such a right, federal law would preempt the application of local land use law.* We conclude, therefore, that in the absence of any right under state property law to clear-cut the trees, state and local laws regulating activity within wetlands and watercourses applied to the [petitioners'] conduct.

(Pet. App., 26a-27a) (emphasis added).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE CONNECTICUT SUPREME COURT DID NOT ADDRESS THE MERITS OF THE PETITIONERS' PREEMPTION CLAIM AS A DIRECT CONSEQUENCE OF THE PETITIONERS' AFFIRMATIVE WAIVER OF THE FACTUAL AND LEGAL BASIS FOR THAT CLAIM AT ORAL ARGUMENT.

Tucked away in a single footnote of the certiorari petition is a dramatically understated, but ultimately fatal, admission: "In the court below, petitioners conceded that to some extent they exceeded the scope of their prescriptive easement under state law to cut trees on the Land Trust and Conservancy properties." (Pet., 12 n.4). In fact, the petitioners' clear and repeated concession at oral argument in the Connecticut Supreme Court, set forth verbatim in the Statement of the Case, constitutes an affirmative waiver of the basis for their preemption claim. As the Connecticut Supreme Court properly concluded, the petitioners' concession that federal law did not give them any legal right to enter the land trust defendants' property in order to trim or cut trees made it unnecessary to consider

whether, if the petitioners had such a right, federal aviation law would preempt local and state land use provisions. (Pet. App., 26a-27a). The Connecticut Supreme Court's decision not to address the preemption question – which was a direct consequence of the petitioners' own repeated concession – makes this an inappropriate case for certiorari.

Section 1257(a) of the Judicial Code, which defines and limits the jurisdiction of this Court over state court proceedings, provides that:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. §1257(a). In keeping with the limited scope of such review, this Court "[w]ith very rare exceptions . . . [has] adhered to the rule . . . that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (internal citation omitted). If both of those elements are lacking, then this Court's "appellate jurisdiction fails." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (quoting *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 391 (1836)).

Furthermore, "[w]hen the highest state court is silent on a federal question before us, *we assume that the issue was not properly presented* . . . and the aggrieved party bears the burden of defeating this assumption . . . by demonstrating that the state court *had a fair opportunity to address the federal question that is sought to be presented here*. . . ." *Adams*, 520 U.S. at 86-87 (emphasis added; internal citations omitted). The assumption that silence by a highest state court establishes a failure to properly present a federal claim forms a core part of this Court's jurisdictional jurisprudence. See *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988); *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987); *Exxon Corp. v. Eagerton*, 462 U.S. 176, 181 n.3 (1983); *Webb v. Webb*, 451 U.S. 493, 501 (1981); *Fuller v. Oregon*, 417 U.S. 40, 50 n.11 (1974) (all refusing to review federal issues where highest state court was silent and issue was not properly presented); see also *Clark v. Jeter*, 486 U.S. 456, 459-60 (1988) ("[i]t is our practice, when reviewing decisions by state courts, not to decide federal claims that were not 'pressed or passed upon' below").

A petitioner therefore must demonstrate two things in order to overcome the presumption that silence by a highest state court establishes a failure to present a federal claim properly. First, a petitioner must prove compliance with all applicable state procedural rules. See *Bankers Life*, 486 U.S. at 77-78; *Webb*, 451 U.S. at 501. Second, a petitioner must "demonstrate that it presented the particular claim at issue here with 'fair precision and in due time'. . . ." *Adams*, 520 U.S. at 87 (quoting *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928)). The former concerns technical compliance with state procedural

requirements, while the latter appears to involve an inquiry into the substantive manner in which a petitioner's federal claim was raised (or waived). *Adams*, 520 U.S. at 87-88. Under both tests,

> at the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb, 451 U.S. at 501 (emphasis in original).

Although this Court has never directly addressed the affirmative waiver of the basis for a federal claim at oral argument before a state's highest court, this Court held that a similar waiver at oral argument before it barred consideration of an appellant's claim in *DeBacker v. Brainard*, 396 U.S. 28 (1969). In *DeBacker*, the appellant asked this Court "to decide whether the preponderance-of-the-evidence standard for burden of proof in juvenile court proceedings . . . satisfies the Due Process Clause of the Fourteenth Amendment." *Id.* at 31. However, at oral argument before this Court, appellant's counsel admitted that "[t]he evidence [was] more than sufficient to sustain a conviction[,]" and that "*[n]o matter what the standard was* . . . our evidence just isn't insufficient." *Id.* (ellipses in original; emphasis added). On the basis of this "commendably forthright explanation by appellant's counsel,"

this Court held that the appellant's federal claim was not appropriate for review. *Id.*

Other circumstances in which this Court has held that a federal claim was not properly presented are likewise instructive. In *Adams*, for example, the petitioners asked this Court to review whether the certification and settlement of a state class action lawsuit violated due process. *Adams*, 520 U.S. at 85. However, not only did the petitioners barely mention the issue in their main brief to the Alabama Supreme Court, they did not discuss it at all in their reply brief, in spite of the fact that the *respondents* addressed the issue in their brief. *Id.* at 88-89. Given those circumstances, this Court held that "it would have been perfectly reasonable for a state court to conclude that the broader federal claim was not before it." *Id.* at 89; see also *Rotary Int'l*, 481 U.S. at 550 n.9 (a "casual reference to a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim subject to our appellate jurisdiction"); *Beck v. Washington*, 369 U.S. 541, 553 (1962) (merely setting forth one sentence discussing federal claim in lengthy brief insufficient).

As in *DeBacker*, the petitioners here seek certification for a legal issue the essential premise of which was waived in oral argument – and an issue which the Connecticut Supreme Court expressly refused to decide because of that waiver. Indeed, this is not a case in which an inference must be drawn as to the reason for the silence of a highest state court on the claimed federal question. To the contrary, the reason for that silence is patently clear: the petitioners' own statements at oral argument. As such, the Connecticut Supreme Court simply did not have "a fair

opportunity to address the federal question that is sought to be presented here. . . ." *Adams*, 520 U.S. at 87.

The Question Presented by the petitioners concerns the extent to which state and local land use rules concerning United States airspace are preempted. The essential premise for this question, as framed by the petitioners at oral argument, is the extent to which state property law also is preempted. Since the state property right the petitioners were found to have had did not permit them to clear cut the 2.5 acres of the neighbor's property, the Question Presented is properly before this Court only if the petitioners argued to the Connecticut Supreme Court that the neighbor's property right not to be clear cut also is preempted. Put another way, whether state and local land use regulations are preempted is of no legal significance now because the petitioners repeatedly told the Connecticut Supreme Court that they had no right to do what they did even if the regulations were preempted and, on that basis, the Court declined to consider the petitioners' federal claim.

It is for this reason that the respondents, in their Concise Statement of the Case, have dwelt on the oral argument before the Connecticut Supreme Court. It may seem odd that Attorney Bashaw on the one hand conceded that his clients had to have a state law right to clear-cut the neighbors' trees in order to make a preemption claim, and on the other hand did not challenge the trial court's finding that his clients had no such right to clear-cut the trees. But the former is just what he did do and the latter is just what he did not do and the result was that the Connecticut Supreme Court did not consider or decide the preemption question.

The waiver by Attorney Bashaw could not be more explicit. It was not one hasty or ambiguous response to one judicial question. The colloquy with Justice Borden went on for several minutes and seven pages of printed transcript. Justice Borden's questions were clear as a bell and he pressed Attorney Bashaw to make sure that he (Justice Borden) was not misunderstanding what he was hearing. Attorney Bashaw's responses were also clear as a bell. To take the most obvious examples:

> MR. BASHAW: No, no, I'm not making any claim, Your Honor, that this [preemption] gives you the right to go onto somebody else's property, to go and cut down and remove their trees.
>
> . . .
>
> I'm not making a claim that the [federal] regulations give you some sort of an easement, a right to go onto somebody else's property, but in this case, in this case that we had here, we had the property right to go onto that property and clear the trees.
>
> . . .
>
> JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's finding of the prescriptive easement?
>
> MR. BASHAW: Certainly, yeah, it doesn't give me the right. If there's no prescriptive easement, Your Honor –
>
> . . .

> JUSTICE BORDEN: – are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.
>
> MR. BASHAW: I cannot remove the trees. Even if I have pre-emption, I cannot go on somebody else's land and remove the trees. The FAA regulations don't permit me to do it. The DOT can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.

(Resp. App., 24-30).

This last remark was clear enough that, when Attorney Bashaw had finished his answer, Justice Borden responded, "Well, I understand your argument." This understanding naturally convinced the Connecticut Supreme Court not to consider the petitioners' federal preemption claim. Indeed, the Court even cited *Westchester v. Greenwich*, the one case Attorney Bashaw referred to during the colloquy. Just as if the petitioners had affirmatively disclaimed the basis for their preemption argument in their briefs to the Connecticut Supreme Court, this explicit waiver at oral argument demonstrates that the petitioners did not present "the particular claim at issue here with 'fair precision and in due time'. . . ." *Adams*, 520 U.S. at 87. As a consequence of this concession, the factual and legal basis for the petitioners' federal claim falls and the petition falls with it.[4]

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[4] The petitioners make no attempt to ameliorate the fatal nature of this concession, and thereby satisfy *their* burden to establish jurisdiction under §1257(a), except to assert that all they conceded at oral

(Continued on following page)

II. THE RECORD IN THIS CASE DOES NOT PROVIDE A SOUND BASIS TO REVIEW THE PETITIONERS' PREEMPTION AND PUBLIC POLICY ARGUMENTS BECAUSE MANY OF THE FACTUAL AND REGULATORY ASSERTIONS IN THEIR PETITION ARE MISLEADING OR UNTRUE.

Not only did the petitioners affirmatively waive the basis for their preemption claim, but a number of the key factual and regulatory assertions in their petition are misleading or simply untrue. These significant gaps in the record also make this case inappropriate for certiorari.

As a factual matter, the petitioners attempt to cloak their conduct in FAA authority by suggesting that their clear-cutting activities were simply part of a continuing effort to comply with supposed federal regulation. To support this, the petitioners point to the results of a 1999 inspection by the Connecticut Department of Transportation, which required them to remove a line of trees *on airport property* that were "obstructions to air navigation". (Pet., 7). While that inspection did occur, and the trees were removed, it has absolutely nothing to do with the petitioners' claim that they were somehow required by federal law to clear-cut 2.5 acres of trees on property that they did not own.[5]

---

argument was that the Land Trust and Conservancy were entitled to damages for trespass. Even a cursory reading of the oral argument transcript belies this assertion. Attorney Bashaw stated, on at least three separate occasions, that federal law preempted state wetlands law only *if* the petitioners had the property right to remove the trees, and that federal law did not give them any such right. (Resp. App., 24-30).

[5] The letter to Mellon from the inspector, Warren Stannard, which was an exhibit at trial and in the Appendix to the respondents' brief in

(Continued on following page)

First, the inspector advised the petitioners that, upon inspection, several "items were noted that need attention to keep the airport in compliance with *State* regulations." (Resp. App., 90) (emphasis added). While the inspector also referenced FAA regulations, his concern with State standards undermines the petitioners' all-encompassing depiction of federal regulation in this area.

More significantly, the inspection dealt exclusively with conditions on *the petitioners' property*. The inspector made no observations or assessment of any property beyond the borders of the airport and certainly made no recommendations concerning "obstructions to air navigation" which may have existed on the property of adjacent landowners. (Resp. App., 90-93). Since this inspection took place only one year before the petitioners took it upon themselves to wipe out 2.5 acres of woodland that they did not own, it is obvious that any "obstruction" that existed at the time of the petitioners' clear-cutting must have existed at the time of the inspection. Nevertheless, the inspector, charged with protecting the navigable air space, took no note of any such obstructions and *did not* require the petitioners to take any steps with respect to potential obstructions on the land of others.[6]

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the Connecticut Supreme Court, is reproduced in the Appendix to this opposition at pages 90-93.

[6] Indeed, at trial the inspector clearly confirmed this point:

> MR. BRANSE: And in your capacity as the [FAA] inspector preparing these [5010 airport inspection] reports, did you authorize activity on land not owned by the airport owner?
>
> MR. STANNARD: No, sir.

(Trial Tr., 3/9/04, 93).

It is also important to note that, with respect to the trees on the petitioners' property that the inspector was concerned about, he addressed only those obstructions that interfered with the theoretical "runway approach surface" described in Part 77 of the federal regulations. The "runway protection zone," which forms so crucial a part of the petitioners' argument, is never mentioned. Thus, despite the petitioners' claims to the contrary, the official charged with enforcing the federal regulations on which the petitioners rely did not believe that clear-cutting 2.5 acres on the Land Trust and Conservancy properties was "called for" under federal regulation.

The petitioners also claim, as if it were established fact, that "[b]y late 2000, trees on the Land Trust and Conservancy properties continued to threaten the safety of takeoffs and landings at the Airport." (Pet., 8). First, as described above, the DOT inspector never said that trees on those properties *ever* threatened the safety of takeoffs and landings, so it is wrong to suggest that they *continued* to do so. Moreover, the petitioners cite only to the decision of the Connecticut Supreme Court to support their claim of threatened safety. (Pet., 8, citing Pet. App., 4a). However, the Connecticut Supreme Court's decision is crystal clear that the alleged threat to safety was merely the petitioners' *claim* in the trial court and not an established fact. If this case truly warranted certiorari, the petitioners would not need to resort to such deceptive tactics regarding the record.

The same distortions exist with respect to the principal regulatory argument made by the petitioners. The central pillar of that argument, repeated at numerous points in their petition, is the claim that federal regulations "call for" the removal of obstructions in a "runway

protection zone". (Pet., 2, 5, 15, 16-18, 23, 29). The petitioners base this claim on FAA Advisory Circular No. 150/5300-13, §§211 and 212, but they are simply wrong to suggest the existence of some federal *requirement* that runway protection zones be cleared. The FAA Advisory the petitioners cite, when read in context, makes it quite clear that there is no such requirement.

First, FAA Advisory Circular No. 150/5300-13, §201a(2)(b), states that runway protection zones "should be on airport property." The area in question in this case is not on airport property. Sections 212a(1)(a) and (b) specifically differentiate between a runway "object free area" and adjacent areas that are subject only to unspecified "controlled activity." Section 212a(2)(a), on which the petitioners specifically rely to suggest that the FAA "specifically forbids forestry activities" in a runway protection zone, (Pet., 5), states that both golf courses and automobile parking are acceptable. Since golf courses usually have trees on them, and since an emergency landing could not be made atop parked cars, the petitioners' argument that the runway protection zone is required by FAA "regulation" to be free of trees in order to facilitate emergency landings is substantially undermined by this portion of the Advisory (which the petitioners fail even to acknowledge).

Most egregiously, the petitioners ignore section 212b, which states in full that:

> Where it is determined to be impracticable for the airport owner to acquire and plan the land uses within the entire RPZ, the RPZ land use standards have *recommendation status* for that portion of the RPZ not controlled by the airport owner.

(Emphasis added).

In other words, with respect to runway protection zones on land not owned by the airport, the FAA *requires* nothing. The FAA merely suggests and recommends; the petitioners' implication that it requires anything is misleading and wrong. Ultimately, the petitioners cannot contend that federal preemption should be based upon a non-binding federal recommendation (whether they characterize it properly or not). That simply is not the law, and the petitioners admitted as much before the Connecticut Supreme Court:

> JUSTICE ZARELLA: Could the FAA, through the DOT, order you to cut that [a 200-foot tall tree in the approach slope area] down?
>
> MR. BASHAW: No, the FAA cannot order you to do that under the Part 77 regulations. What the FAA can do, however, is what they will do is they'll come up, they'll identify a problem.
>
> In fact, what Your Honor is actually getting to is a point . . . that these Part 77 regulations are advisory, they're not enforceable.

(Resp. App., 20).

Finally, the petitioners' claim of a conflict with decisions of the Ninth and Second Circuits is unadulterated fiction. First, it is telling that the petitioners claim a conflict, not between decisions of the Ninth and Second Circuits and the decision of the Connecticut Supreme Court, but between decisions of the Ninth and Second Circuits and "the decisions below". (Pet., 19). This phrase is merely a euphemism for the decision of the trial court, which, due to the petitioners' concession, is the only court that actually addressed the preemption question. It is, of course, necessary for the petitioners to engage in this sort

of linguistic legerdemain, given that the Connecticut Supreme Court expressly declined to decide the issue on which the petitioners allege a conflict. However, the petitioners' disingenuous description does not constitute the type of conflict envisaged by Rule 10(b) – i.e., in which "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. . . ." SUP. CT. R. 10(b). A conflict with the decision of a trial court does not come close to meeting that standard.

Second, the issues in this case are entirely distinct from the issues in the cases cited by the petitioners. Both of those cases, *United States v. City of New Haven*, 496 F.2d 452 (2nd Cir.), *cert. denied sub nom. Town of East Haven v. United States*, 419 U.S. 958 (1974), and *Burbank-Glendale-Pasadena Airport Authority v. City of Los Angeles*, 979 F.2d 1338 (9th Cir. 1992), concerned property *owned by the airport* and the right of a municipality to exercise control over the airport's use of *its own property*. Neither case dealt with the issue here – i.e., what the owner of an airport may legally do on the property of *others*.[7] Because they involved an entirely different question, the

[7] Petitioners are wrong to suggest that the decision in *City of New Haven* had anything to do with "buying property." (Pet., 20). The court in that case addressed only the question of East Haven's authority to control property already owned by New Haven, the owner of the airport. In affirming the trial court's decision, the Second Circuit noted that the lower court "did not rule on the legality of New Haven's acquisition of the land in East Haven. . . ." *City of New Haven*, 496 F.2d at 454.

decisions in those cases necessarily cannot present any conflict with this case.[8]

Moreover, both *City of New Haven* and *Burbank-Glendale* are thin on analysis and sparsely reasoned, limiting their application beyond their own facts. Neither provides the kind of thoughtful analysis that should make this Court concerned over a possible conflict among the circuits. *City of New Haven*, though now more than 30 years old, has been *mentioned* by the Second Circuit only once since it was written, and never relied on by that court as controlling authority. It has been cited only sporadically by other courts.

Burbank-Glendale has received even less welcome. Courts have repeatedly declined to follow the decision, calling its review "cursory" and "unhelpful," *In re Commercial Airfield*, 752 A.2d 13, 16 (Vt. 2000), and its analysis "incomplete," *People ex rel. Birkett v. City of Chicago*, 769 N.E.2d 84, 94 (Ill. App. 2d Dist.), *aff'd in part, rev'd in part*, 779 N.E.2d 875 (Ill. 2002). The Court of Appeals of Texas found that *Burbank-Glendale* had nothing to do with local land control when the appellants in that case tried to argue otherwise: "No one disputes that federal laws preempt local regulation *within the boundaries of an airport*. We cannot find that the Ninth Circuit holds more."

---

[8] Petitioners also claim that the "decisions below" are in conflict with the position of the United States as expressed in an *amicus curiae* brief filed in the matter of *Vorhees v. Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). (Pet., 23-25). Like *City of New Haven* and *Burbank-Glendale*, *Vorhees* involved only the effort of a neighboring property owner to assert state law claims to control the airport's use of its own property. The case had nothing to do with an airport owner's attempt to take and control property he does not own through the application of federal preemption.

Dallas/Fort Worth International Airport Board v. City of Irving, 854 S.W.2d 161, 168 (Tex. App.), *vacated in part*, 868 S.W.2d 750 (Tex. 1993) (footnote omitted; emphasis added).

Finally, the United States District Court for the Northern District of Indiana offered this analysis of the shortcomings in the Ninth Circuit's decision:

> However, this Court declines to follow [*Burbank-Glendale*], partly because it is not controlling authority, but mostly because it is unpersuasive. The Ninth Circuit cited only two cases in support of its finding, and it misstated the holdings of those cases. As explained *supra*, *City of Burbank* and *Gianturco*[9] do not hold that the FAA preempts any regulation "that directly interferes with aircraft operations"; rather, they stand for the much narrower proposition that the FAA preempts regulation of aircraft noise. . . . In short, [*Burbank-Glendale*] is cursorily and poorly reasoned, and thus this Court joins others that have declined to follow it. *City of Cleveland, Ohio v. City of Brook Park, Ohio*, 893 F.Supp. 742, 751 (N.D. Ohio 1995) ("[*Burbank-Glendale's*] view of the scope of the Aviation Act is simply broader than that implied by any reasonable reading of the statute").

Hoagland v. Town of Clear Lake, 344 F.Supp.2d 1150, 1157-58 (N.D. Ind. 2004), *aff'd*, 415 F.3d 693 (7th Cir. 2005) (additional citations omitted).

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[9] *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); *San Diego Unified Port Dist. v. Gianturco*, 651 F.2d 1306 (9th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

In *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923), Chief Justice Taft noted that "[t]he jurisdiction of the Supreme Court to review cases by way of certiorari was not conferred upon this Court merely to give the defeated party . . . another hearing." *Id.* at 163. In spite of the petitioners' dire predictions, this case actually presents nothing more than disgruntled litigants seeking yet another bite at the apple – in spite of their own affirmative waiver of the basis for the federal claim on which they now seek review, and in spite of the unsuitability of the record for review of the issues that they raise.

CONCLUSION

For the those reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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SC17280 TTD	: SUPREME COURT
JAMES VENTRES ET AL.	: STATE OF CONNECTICUT
V.	:
GOODSPEED AIRPORT, LLC, ET AL.	: IN HARTFORD
	: APRIL 14, 2005

BEFORE:

CHIEF JUSTICE WILLIAM SULLIVAN
JUSTICE DAVID M. BORDEN
JUSTICE FLEMMING L. NORCOTT, JR.
JUSTICE RICHARD N. PALMER
JUSTICE PETER T. ZARELLA

APPEARANCES:

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MIKE DONNELLY, ESQ.

Joy E. Franklin
Court Monitor

* * *

[2] JUSTICE SULLIVAN: Good morning.

Counsel, how do you want to work this? This is two cases but it's really one case. Do you want to take them separately or you want to take them as one case, or how do you want to do it?

MR. BASHAW: Your Honor, with the Court's permission, what the parties would with to do is allocate an hour's worth of time to the appellant to deal with both cases at the same time since both cases arise out of the same facts, the same memorandum of law.

Specifically, the appellant is actually going to reserve, if the Court provides, 25 minutes of time for rebuttal, so after 35 minutes of argument by the appellants which would cover both cases, both appeals, the other parties will each argue 20 minutes each, however they've allocated among themselves, and then there will be time for rebuttal if that pleases the Court.

JUSTICE SULLIVAN: So you're saying we're going to handle them as one case.

MR. BASHAW: Yes, Your Honor.

JUSTICE SULLIVAN: You're going to take an hour and you're going to request 25 minutes for rebuttal. Okay.

MR. BASHAW: That's correct, Your Honor.

JUSTICE SULLIVAN: What about the appellees?

MS. BROOKS: Assistant Attorney General Janet Brooks from the Attorney General's Office.

Our request to have two assistant attorneys general [3] argue was approved, so the first appellee to argue will be Attorney Branse on behalf of the Wetlands Commission. Then the Attorney General's Office will use its 20 minutes.

Fifteen minutes I will argue and five minutes for Attorney Wrinn who will argue one issue, which is the

issue of personal liability of Mr. Mellon, to be followed by the 20 minutes for Attorney Donnelly.

JUSTICE SULLIVAN: Okay. But you're going to have to keep track of the five minutes, the twenty minutes and all that. Okay?

So you want to reserve 25 minutes, is what you're saying, from 60.

MR. BASHAW: Yes, Your Honor.

JUSTICE SULLIVAN: All right. Okay.

MR. BASHAW: May it please the Court, my name is John Bashaw. I'm here representing the appellants in these two appeals: *Goodspeed Airport LLC, Timothy Mellon*, and *Timothy Evans*.

The appeals that are before the Court today arise out of the same set of facts, the facts being the cutting of trees by Goodspeed Airport at the southern end of the runway operated by the Goodspeed Airport in East Haddam, Connecticut.

The cutting of those trees occurred from November 29, 2000, to December 6, 2000.

The Inland-Wetlands Commission brought an action against the "airport parties" is how I will collectively [4] refer to them here for matters of convenience, claiming that the cutting of those trees, since the trees were located in an inland-wetland, violated the Inland-Wetlands Act.

The Inland-Wetlands Commission also brought a cause of action against the East Haddam Land Trust and the Nature Conservancy because the trees were located on land that's owned by those entities.

They, then, filed cross-appeals against the Goodspeed Airport, essentially for claims in trespass, violation of CUTPA, violation of the Connecticut Environmental Protection Act.

A separate complaint was brought by the Connecticut DEP in three counts against the airport parties for the same cutting of the trees. Two of those counts were CEPA counts. The third count was withdrawn by the DEP prior to trial.

The facts in this case, Your Honors, concern the, again, the cutting of the trees in an area that is south of a runway that's operated by Goodspeed Airport in East Haddam, Connecticut.

The airport was established in 1964 and 1965 and, at that time, the area in which the trees were cut in 2000, which I will refer to herein for convenience as the "cut area", was also cut in the 1964-1965 time period. Aerial photographs provided at trial show that to be true.

The area of the cutting was actually larger than what occurred in the Year 2000, although the evidence did show that some trees still remained in the cut area in the 1964-[5] '65 time period.

Evidence at trial also showed that on a periodic basis, after 1964 and '65, the various owners and operators of the airport proceeded to do additional cutting and removal of trees, as they caused harm or danger to aircraft that would be landing at Goodspeed Airport.

The physical layout of the airport, which might be of assistance to the Court in considering these issues, is you have Goodspeed Airport.

Directly to the south of the airport is a tidal brook that forms a boundary between the Goodspeed Airport property and property that's owned by the East Haddam Land Trust.

It's approximately 630 feet from the end of the paved portion of the runway to where that tidal brook is located.

The –

JUSTICE NORCOTT: I can't remember; I read this a couple days ago. Is there a map in any of these appendix that show that?

MR. BASHAW: In some of the trial exhibits there might have been.

JUSTICE NORCOTT: But none in the appellate briefs?

MR. BASHAW: I don't know, Your Honor, if there, I don't know if one was submitted –

JUSTICE NORCOTT: Thank you.

MR. BASHAW: – but there was another 335 feet of length, which is land owned by the East Haddam Land Trust, and a very small strip of land owned by the Nature [6] Conservancy, and then you have Chapman Pond.

The full extent from the end of the paved portion of the runway to where Chapman Pond is located is a thousand feet. The cutting occurred within that area.

So, experts at the trial also testified and witnesses testified that on a regular basis the trees were cut, removed, and trimmed to make way for planes.

The testimony did not say that it was cut to the extent that it was cut in 1964 and '65, when, essentially, the whole area was cut.

That evidence consisted of review of aerial photographs, a review of the Connecticut Department of Transportation file where they actually had Polaroid photographs that they took when they did inspections of the airport that showed what the trees looked like at the end of the runway.

It also included the testimony of the owners and operators of the airport at the time, that said on a regular basis, again, they removed the trees.

The Goodspeed Airport bought the airport in July of 1999. Mr. Mellon is the single member of the LLC.

Mr. Evans is a private contractor who performed the cutting at the request of Goodspeed Airport. Those are the three defendants in this matter.

After the trees were removed in November and December of 2000, the Inland-Wetlands Commission issued a cease and desist order to the airport parties.

[7] That cease and desist order said, basically had the effect of being so broad as to prevent the airport from even cutting its own grass on its property without the permission of the Inland-Wetlands Commission.

It said that you cannot remove any vegetation on the wetlands. The airport and the cut area are both located in flood plains of the Connecticut River which are defined by the Inland-Wetlands Act as wetlands. So, its so broad it prohibits the airport from cutting its own grass, if you take it to that extent.

Well, obviously, the airport parties appealed that decision, as required by law or as permitted by law. A hearing began in January of 2001. It ended in February of 2001 after four members of the Inland-Wetlands Commission recused themselves from the matter, leaving no quorum, and then they closed the hearing.

At no time did the airport parties, were they able to provide any evidence to the Inland-Wetlands Commission and, so, as the Trial Court ruled in this matter, that cease and desist order still is in effect.

I'd like to discuss with the Court what I believe is the strongest argument here today for the airport parties and for any party, and that's the issue of federal pre-emption.

The issue of federal pre-emption is also dispositive of almost all the claims that are before the Court today with perhaps the exception of the argument over the [8] prescriptive easement.

It's the position of the airport parties that neither the Trial Court nor the appellees of this Case have applied the correct federal pre-emption standard.

Of course, federal pre-emption arises out of Article 6, Section 2 of the U.S. Constitution that says that the laws of the United States should be the supreme law of the land.

The two federal laws at issue in this case are Title 49, Section 40-103a of the Federal Aviation Act, which says very succinctly: The United States government has exclusive sovereignty of airspace of the United States; exclusive sovereignty.

The other federal law at issue in this case is Section 41-71(3)(b)(1) which is under the Airline Deregulation Act.

That statute provides that a state may not enact or enforce any law or regulation or other provision having the force and effect of law related to a price, a route, which is the issue that's relevant in this case, or service of any air carrier that may provide air transportation under this act.

So, therefore, the issue in this case, succinctly, is: Do these two federal laws, under the Federal Aviation Act and the Airline Deregulation Act, preempt and prohibit the State of Connecticut and the Inland-Wetlands Commission from enforcing the Inland-Wetlands Act against the airport [9] parties and punish them under CEPA for the removal of the trees?

JUSTICE SULLIVAN: Did anybody from the FAA tell you that you had to cut these trees down at this time?

MR. BASHAW: These particular trees?

There was a letter that was received from the DOT, which acts as the agent of the FAA in many matters, when they did an inspection in September, I believe it was, of 1999 where they indicated that there were trees located on the airport property that needed to be removed, and they identified a line of trees to the south that also needed to be removed.

It did not specifically identify the whole area in which the tree cutting occurred. It referred to a line of trees.

JUSTICE SULLIVAN: Were these trees in this particular area?

MR. BASHAW: A portion of the cut area was within the line of trees, yes.

JUSTICE SULLIVAN: Did you seek a permit from the local Inland-Wetlands Commission?

MR. BASHAW: No, Your Honor, we did not, and we did not –

JUSTICE SULLIVAN: So you can't say what they would have done, then, if you did.

MR. BASHAW: Pardon me, Your Honor?

JUSTICE SULLIVAN: You can't say what they would have [10] done if you had submitted a request for a permit.

MR. BASHAW: That's correct.

The Inland-Wetlands Commission may have approved the full cutting on the land, but, based upon the arguments that have been raised, that's highly doubtful, but, no, they did not seek a permit because, again, the position is it didn't have to because this is subject to federal – it's preempted, that the airport has a right, under the Federal Aviation Act and the regulations adopted pursuant thereto in advisory circulars, to maintain clear airspace.

JUSTICE SULLIVAN: When the DOT told you to cut these trees down, did they tell you they were acting for the FAA?

MR. BASHAW: No, I don't believe they specifically said they were acting for the FAA. I think it was assumed that that's how the FAA delegates its authority to the DOT.

JUSTICE SULLIVAN: Well, you said "on some occasions".

MR. BASHAW: I'm not familiar with all areas of FAA regulation in which the FAA may withhold some of its specific regulatory, authority and may not delegate to the states. That's what I meant; I just don't know.

Under the test for federal pre-emption, basically, there are three standards for federal pre-emption, or three separate tests.

One is federal pre-emption exists where the laws themselves explicitly provide for pre-emption.

Secondly, pre-emption exists where you can find from [11] congressional intent, where intent can be inferred where Congress legislates comprehensively, thus occupying the entire field of regulation.

And, last, pre-emption can exist where there is explicit and clear conflict between implementation of the state law and implementation of the federal law.

Its the position of the airport parties that all three forms of federal pre-emption exist in this case.

With respect to explicit pre-emption, I've already mentioned to the Court the two federal laws at issue in this case.

The FAA law, which says that the United States has exclusive sovereignty of the airspace, obviously begins with the premise of what is federal airspace, but that is the only area in which the federal government has exclusive sovereignty.

There are a number of federal cases that are cited in our brief that explain what is navigable airspace. It clearly is that airspace which exists above what are called the "approach slopes" or minimum altitudes that are established by the FAA for airplanes that approach an airport runway.

Those standards are set forth at Part 77 of 14(c) (f) (r).

Basically – again, this is put forth in detail in the briefs – but the approach slope for this particular runway at Goodspeed Airport has a height that begins at the front end [12] of the East Haddam Land Trust where the front portion of the trees were located at 21½ feet above the ground, and it slopes up gradually to a height of 38 feet at the end, so you can imagine a slope in which the planes are approaching the airport and they are coming down at an angle.

Anything above that glide slope clearly is within the navigable airspace, and the evidence in this case showed, and is presented in the briefs and in the record, that many of the trees that were cut were up to 72 feet tall, clearly above 35 feet tall. They clearly protruded into the glide slope.

Not all of the trees did and there were shrubs that were also removed, but that still is within the navigable airspace because what the courts also say, and it's also in the statute, that the navigable airspace also includes the airspace needed to insure safety in the take-off and landing of aircraft.

The FAA has adopted an advisory circular which recommends for all airports that they maintain what's

called a "clear runway protection zone". It's referred to as an RPZ.

The RPZ extends for a thousand feet beyond the end of the runway, which would cover the full extent of where this cutting occurred.

JUSTICE NORCOTT: Can I ask you just a pretty simplistic question?

MR. BASHAW: Sure.

[13] JUSTICE NORCOTT: How long has the airport been there?

MR. BASHAW: Since 1964 or 1965, Your Honor.

JUSTICE NORCOTT: And the trees have always been there.

MR. BASHAW: No, not quite, Your Honor, actually.

Before 1964 and '65, because of floods in the 1930's, this area was pasture land, so it really only grew up into forest land since the floods, if you will.

JUSTICE NORCOTT: And that date was what?

MR. BASHAW: I think the floods were in the '30s and then it was used as pasture land up until about the '60s, if you will, and then it started growing in with trees.

JUSTICE NORCOTT: So, as far as air safety's concerned, it's a recent problem.

MR. BASHAW: Well, it's been a problem ever since the airport's been there.

JUSTICE NORCOTT: The existence of the height of the trees, I mean.

MR. BASHAW: Yes, Your Honor, ever since the airport's been there.

With respect to explicit pre-emption, Your Honor, again, it's our position that navigable airspace is, despite claims by the appellees to the contrary, in this particular case, literally, above the blades of grass because, as testified by the only aviation expert who testified at trial, he explained why this RPZ was so important.

[14] It's an area where planes need to have some comfort that if they fail in take-off, that they can land without causing harm and damage.

So, it's, again, the position of the airport parties that the navigable airspace is, in this case, well above the heights of the shrubs. It's as close as the blades of grass in this particular area and for this particular case.

Enforcement of the Inland-Wetlands Act in this case, as agreed to by the Trial. Court and as argued by the appellees, what it would result in is having to go and get a permit from the Inland-Wetlands agency to remove any obstructions to navigation.

If those obstructions are not permitted to be removed, then they will grow into the RPZ, they will grow into the approach slope to the runway and, in fact, because the airport is located in a flood plain, if a tree were to grow in the middle of the runway, they cannot remove that tree under the theory that's proposed by the Trial Court and by the appellees. They have to get permission from a local entity who can use their discretion and say, No, that tree must stay, we're not giving you a permit.

That tree is in the navigable airspace. That is within the exclusive sovereignty of the United States. It's expressly pre-empted by the Federal Aviation Act, and, more to the point, it's expressly pre-empted by the Airline Deregulation Act. The Airline Deregulation Act explicitly says no state law may interfere with any route to an [15] airport.

Clearly, if you have a tree growing in the middle of a runway, or let's get more practical with this case. If these trees are not allowed to be removed and they will grow to such heights at the end of the runway that they will effectively prohibit the use of that runway, it will be too dangerous to use that runway.

The runways only 2100 feet to begin with right now. It's not a long runway, but as the trees grow in height, the ability of pilots to come into that airport and use the appropriate approach angle becomes less and less.

JUSTICE BORDEN: Was there any evidence that before this clear cutting took place, Mr. Bashaw, the airport's defendants asked to contact the owners of the property and/or the Department of Transportation and said, Look, we've got a problem of airport safety here. We've got to do some cutting.

MR. BASHAW: Other than, Your Honor, requesting that the DOT come out and do an inspection when they first operated the airport, which the DOT did –

JUSTICE BORDEN: But that was several years before.

MR. BASHAW: That was right after they acquired the airport, that's right. It was several years before they did the clear cutting.

JUSTICE BORDEN: Yes, I'm talking about before going on and just clear cutting someone else's property, even though it's adjoining the airport, was there any evidence [16] that they said, We've got a problem. Its your property. DOT is basically the surrogate for the FAA. We think we have to cut the trees because planes are at risk.

Did anything like that happen?

MR. BASHAW: There were discussions with the Land Trust and the Nature Conservancy but it dealt –

JUSTICE BORDEN: I'm talking about in the evidence in this case.

MR. BASHAW: Not in the evidence in this case, your Honor, because it was the position of the airport that they had a prescriptive right to go onto that property and remove the trees, which the Trial Court agreed that the airport did have a prescriptive right to remove the trees.

A difference of opinion, of course, is in the scope of that and the Trial Court claimed that the airport exceeded the scope, but the airport did have a prescriptive easement to go onto that property and remove certain trees, and, so, no, so, evidence in this case did not discuss that particular issue.

JUSTICE PALMER: Counsel, was it to remove certain trees or to top off certain trees, or both?

MR. BASHAW: Well, the Trial Court said that there was evidence that both had occurred, that there had been evidence of trimming of trees in the past and also felling of the trees at their base.

JUSTICE PALMER: Just refresh my – did the Trial Court conclude that the defendant had a prescriptive easement to [17] remove certain trees altogether?

MR. BASHAW: Yes. The Trial Court said that with respect to the prescriptive easement, the prescriptive easement covered the removal and/or topping of trees on a – basically, it is based on an as-needed basis and on a regular basis, cutting them at the base – there was evidence of that in the past – but what the Trial Court said triggers that requirement is either the DOT coming onto the property and saying, You need to remove those trees, or complaints from pilots as they're coming in, saying, Look, I almost hit that tree, or, I did. You know, my landing gear nicked those trees coming in.

When pilots complain or the DOT says you need to do something – this is the Trial Court's decision and we actually disagree with some of the scope, we think the scope is broader – but the Trial Court at least said, under those circumstances, you have the right to go out and remove the trees that are causing the problems.

That can be topping, if that's possible, or I could be felling them at their base which also was done in the past.

JUSTICE ZARELLA: What about a tree that is wholly under the approach slope that you've talked about?

MR. BASHAW: Well –

JUSTICE ZARELLA: What if the tree is a ten-foot tree –

MR. BASHAW: Yes.

[18] JUSTICE ZARELLA: – doesn't go into the airspace. Do you have a right, under the prescriptive easement, to remove that tree?

MR. BASHAW: Well, under the Trial Court's ruling?

The Trial Court's ruling I would have to honestly say unless for some reason that tree was uniquely positioned so that pilots are saying, You know, that thing is dangerous, it needs to be removed, even though it's beneath the glide slope, then I think under the Trial Court's ruling, that tree could be removed, but, generally speaking, I think the Trial Court's ruling, basically is, you know, as the DOT identifies it, and the DOT might identify that tree as being offending –

JUSTICE BORDEN: How many –

MR. BASHAW: – so it's possible that it could.

JUSTICE BORDEN: – is there one runway?

MR. BASHAW: Yes – well, technically, there is one paved length of runway. It, essentially, is two runways. In a sense, it's one runway for the south and one runway for the north. You see in the briefs it's referred to as Runway 32. There's a Number 32 painted on the end of that runway.

JUSTICE BORDEN: How wide is that?

MR. BASHAW: The runway I believe is about a hundred feet wide? I'm not quite sure. I may be off on that. I don't know exactly.

JUSTICE BORDEN: In round numbers, how wide is the plaintiffs' property?

[19] MR. BASHAW: The plaintiffs' property. The appellants' property? The airport's property?

JUSTICE BORDEN: No, the plain –

MR. BASHAW: – Land Trust?

JUSTICE BORDEN: – the Land Trust property.

MR. BASHAW: Well, the Land Trust property is actually – from the front end of their property where it borders the creek, which is the property line with the airport property, to where it borders the Nature Conservancy property, its about 300 feet wide, thereabouts.

JUSTICE BORDEN: And, as I understand it, your clients clear cut the entire 300-feet width.

MR. BASHAW: Oh, yes, yes, Your Honor, my clients removed all the woody vegetation, essentially, from the brook to that 300-foot extension and also three trees that were located on the Nature Conservancy property which is as you (unclear) to the pond.

JUSTICE BORDEN: Well, what I'm trying to get in my mind, because we don't have a map in front of us, is if you've got a runway a hundred feet wide and you've got planes coming in or going up, I want to know how wide that property is that was clear cut to get a sense of the need and the danger.

I mean, I can see, arguably, in a path roughly along the same line of the runway a hundred feet or maybe 120 feet, ten feet on either side – planes don't usually, kind of, land or take off on an angle – and I'm trying to get a [20] sense of how much on either side of that, say, 120-foot width the clear cutting was done.

MR. BASHAW: Well, it might be helpful, Your Donor, for me to just do one thing as a preface to that.

The federal Part 77 glide-slope regulations, what they basically provide is for a 200-foot area just south of the paved portion of the runway. That's 250 feet wide. That has to be cleared of all vegetation. That's called "primary surface".

Beginning at the end of that primary surface and now sloping upward at a 20 to 1 ratio is what's called the "glide slope".

That glide slope also expands at a 5 to 1 ratio, so it's widening ever so gradually as it's going up, so the Trial Court ruled that the cutting occurred within that prescribed area, that space.

Just to finish on the explicit pre-emption issue and following up on the Airline Deregulation Act, again, if the trees are allowed to grow in this area under the Inland-Wetlands Act or if the airport is going to be punished under CEPA for removing trees that are obstructions, that will necessarily cause planes to re-route.

They will either have to come in from the other section of the runway, which might not be the optimum conditions for air flight, or they might have to go to another airport, and under the Airline Deregulation Act, that is not prohibited, that's not allowed. [21] The case law that's cited in the brief under the Airline Deregulation Act says that the language in that act is very, the print effect is very, very broad, perhaps broader than under the Federal Aviation Act provision cited to the Court.

JUSTICE ZARELLA: On this approach slope that you're talking about, could the FAA order you to cut

down a tree that was, say, 200 feet tall, that obviously protruded into the airspace?

Could the FAA, through the DOT, order you to cut that down?

MR. BASHAW: No, the FAA cannot order you to do that under the Part 77 regulations. What the FAA can do, however, is what they will do is they'll come up, they'll identify a problem.

In fact, what Your Honor is actually getting to is a point that I'll jump to (unclear) the Trial Court's discussion of *Catchings versus Glendale* (phonetic), which basically said that these Part 77 regulations are advisory, they're not enforceable.

Now, it's true. On their face, the Part 77 regulations do not permit the FAA or the DOT to order the airport owner to remove that tree. However, what could happen is the Connecticut DOT issues an airport a license to operate under, again, authority from the FAA.

In order to have that license and to continue to use that license and have it renewed, you need to have clear [22] glide paths, so if you do not remove those trees or don't have the ability to remove those trees, you could lose your license, you won't be able to operate, and that issue is relevant under the Part 77 analysis.

I'll refer the Court in particular to what the case is called *Big Stone Broadcasting*. It's out of the District of South Dakota.

In that case, the issue was somebody wanted to build a tower, a radio broadcast tower, near an airport. The FCC needed to issue a license for it, but the FCC won't issue a

license unless they have a determination of no hazard to air travel from the FAA.

Well, the FAA looked at the issue, looked at the glide slopes in particular and said, We find that there's no hazard here. The State of South Dakota, however, came in and said under their own regulations, That is a hazard and we won't let you build that tower.

Well, the proponents of the tower claimed that the State decision was pre-empted and they discussed specifically the Part 77 regulations and how they're only advisory, but the Court in *Big Stone* said it doesn't matter because those particular regulations have utmost importance because in order for the FCC license to be issued, you needed that determination under Part 77.

Similarly, in this case, to have a license to operate and to continue to have that license to operate and not have it be at risk of being revoked, you need to maintain glide [23] slopes. You need to remove those trees if you have the property right to do so.

In this case, the Trial Court said we do have the property right under circumstances where a pilot might say, That tree's in the way and needs to be removed, so it's a very similar case.

The other point from *Big Stone* is the *Big Stone* court said, We don't necessarily subscribe to the view that the FAA doesn't have authority somewhere in federal courts to enforce their regulations under Part 77.

Court didn't discuss where that authority arose but they weren't buying it.

Now, *Catchings versus Glendale* also is not even a pre-emption case; *Big Stone* is. *Catchings versus Glendale* is a case dealing with negligence.

The issue there was: Was the airport negligent in not maintaining a clear glide slope?

The Court said since there's nothing that mandates them to do this, there's no duty, and, therefore, for negligence per se issues, we can't find that there's a cause of action. It wasn't even a pre-emption case.

Also – and this goes to the issue of implicit preemption – the test for implicit pre-emption which comes out of *Florida Lime Growers*, basically says if there is federal superintendence of a field, of an area, then any state regulation, any state action that is aimed at or is similar to, that has any impact on that federal superintendence, [24] must be pre-empted.

It doesn't matter whether that federal superintendence arises out of Part 77 regulations that are not enforceable or recommendations or advisory because, in particular, what you have to do for that test, and I urge the Court to do this, is you look, first, at the two statutes that we've already cited.

Then, you look at the Senate report and the House report that was issued when the Federal Aviation Act was adopted, and the language is cited in the brief.

In particular, Congress said when they adopted the Federal Aviation Act: Aviation is unique among transportation industries and its relation to the federal government. It is the only one whose operations are conducted almost wholly within federal jurisdiction and are subject to little or no regulation by the states or local authorities.

Thus, the federal government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest. (End of reading)

So, there's a statement by the Senate of how important it is to have national federal superintendence of the area, of maintaining air safety and protecting the clarity of navigable airspace.

The House also said that the purpose of the Federal Aviation Act is to give the FAA administrator full responsibility and authority for the advancement and [25] enforcement of safety regulations.

Add to that the Part 77 regulations which establish these glide slopes. Add to that the advisory circular which recommends clear runway protection zones, and then add to that, as well, the numerous federal court decisions that say that the regulation of the airspace by the FAA is pervasive.

One case in particular, again, just referring the Court, is *United States versus City of Berkeley*.

It's a 1990 decision and it basically says where local control over federal activity obstructs the achievement of a congressional objective, local regulation is pre-empted. Congressional objective such as enhanced air safety may not be thwarted by local fiat.

Again, the point here is the law, it cannot be much clearer, of the presence of federal superintendence of the area of air safety and maintaining clear approaches to airports and areas for –

JUSTICE BORDEN: Was there any evidence in the case of – there certainly wasn't any evidence, I take it,

that either the FAA or the DOT told your clients to cut these trees.

MR. BASHAW: Other than, again, Your Honor, than identifying back in '99 a line of trees that were obstructions, yes.

JUSTICE BORDEN: Yes. Was there any evidence that there had been pilot complaints about the trees?

MR. BASHAW: For the trees that existed at that time?

[26] There was testimony in the past about planes hitting trees but not specifically with respect to these particular trees. These trees were much taller than the trees in the past.

JUSTICE BORDEN: I guess to make it more narrow, was there any evidence that this clear cutting of the entire piece was done in response to pilot complaints?

MR. BASHAW: I don't believe that there was testimony to that effect.

JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to do that are simply pre-empted.

MR. BASHAW: That's correct, Your Honor.

That –

JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: Well, no, not true there, Your Honor.

What our position is, Your Honor, that you do not need an order from the DOT to remove the trees. You do not need a directive from them.

If the trees protrude into the federal glide slope or if they are otherwise located in a runway protection zone and you otherwise have the property right to remove those trees, than you don't have to go get permission from the DOT. You do not need permission from the FAA to remove those trees. You can do it because you're trying to maintain air safety.

[27] Now, you do need –

JUSTICE BORDEN: What if there were – instead of trees, what if someone had built – I mean, I know this is a land trust so it wasn't, but let's suppose it's not a land trust.

There's a building there, a house, but there are no complaints by pilots that the height of the house is impeding their take-offs or their landings.

Neither DOT nor FAA has said, We've got to do something about that house. The house is 20 or 30 feet high, whatever it is.

I take it your argument would be that because of federal pre-emption, your client could go out and bulldoze the house and he couldn't be –

MR. BASHAW: Actually, no, Your Honor.

JUSTICE BORDEN: No?

MR. BASHAW: I want to be clear.

If that was my client's house –

JUSTICE BORDEN: No, no, no, no, this is a house on someone else's –

MR. BASHAW: Okay. If this is somebody else's house?

JUSTICE BORDEN: – this is the house on that land.

MR. BASHAW: No, no, I'm not making any claim, Your Honor, that this gives you the right to go onto somebody else's property, to go and cut down and remove their trees. There's a case, I think it was *City of Westchester*, – it's a Connecticut decision – that dealt with abrogation [28] easements.

I'm not making a claim that the regulations give you some sort of an easement, a right to go onto somebody else's property, but in this case, in this case that we had here, we had the property right to go onto that property and clear the trees.

What I'm saying is we had that property right but, yet, the appellees are saying, You still needed to get permission from the Inland-Wetland Commission to remove those trees, and we're going to punish you under CEPA for removing those trees.

Our position is when you have the property right to go do the work, then you cannot have local interference or state interference with that activity.

That's our position, Your Honor.

JUSTICE BORDEN: So your argument for federal pre-emption, I'm not sure I understand its relation to the easement.

Your clients claimed a prescriptive easement. I mean, if –

MR. BASHAW: And the Trial Court so found, but, yes –

JUSTICE BORDEN: But that's challenged.

MR. BASHAW: That's correct.

JUSTICE BORDEN: I mean, it's not like they had a deed, you know, an easement by deed which said you have the right to do this.

MR. BASHAW: That's right.

[29] JUSTICE BORDEN: They went and they did it and the Trial Court agreed with them. The other side challenges that in their cross appeal –

MR. BASHAW: Correct.

JUSTICE BORDEN: – but I'm still trying to – that's a matter of state property law.

MR. BASHAW: I agree, Your Honor.

JUSTICE BORDEN: How does that affect, one way or the other, whether you're pre-empted?

It seems to me if your pre-emption argument is correct, it's correct irrespective of whether you had an easement to do that. Isn't that so?

MR. BASHAW: Well, let me give you another example, Your Honor.

JUSTICE BORDEN: Well, no, I'm trying to –

MR. BASHAW: Yes –

JUSTICE BORDEN: – I'm trying to under – you said to me, well, you couldn't just go bulldoze somebody's house – well, your time is up but I'll have to take a little bit of it – you couldn't go bulldoze somebody's house because in this case you had an easement to cut trees.

MR. BASHAW: Right.

JUSTICE BORDEN: But I don't understand how – I thought if you have federal pre-emption because this is airspace, under federal pre-emption local laws are pre-empted, so even if this had happened in the 14th year instead of the – well, in the 16th year so you didn't have an [30] easement by prescription – your federal pre-emption argument would be the same, wouldn't it?

MR. BASHAW: Well, again, Your Honor, I think still pre-emption – the whole point of pre-emption is if I have the right to remove the trees.

The airport itself, the airport property itself which is located in a flood plain, all right, the Inland-Wetlands position is I have to go and get their permission to remove the trees that are on my own property.

I could get punished under CEPA, my client could get punished under CEPA for removing those trees on his own property. That's what's pre-empted. You can't let local laws affect the airport's ability to maintain clear space around its airport when it has the property right to do so.

I do not claim –

JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's finding of the prescriptive easement?

MR. BASHAW: Certainly, yeah, it doesn't give me the right. If there's no prescriptive easement, Your Honor –

JUSTICE BORDEN: Let's suppose that this had happened – let's suppose that the Trial Court had rejected your easement. They said, Yes, you did it but it wasn't continuous or it wasn't open and notorious. You failed in some proof of your prescriptive easement cause of action.

MR. BASHAW: Correct. But it –

JUSTICE BORDEN: So you didn't, the Trial Court [31] rejected your claim of an easement. Would you still have a pre-emption argument –

MR. BASHAW: Not with re –

JUSTICE BORDEN: – on the claim of the Inland-Wetlands Commission?

MR. BASHAW: Not with respect to the East Haddam Land Trust and the Nature Conservancy land.

I would, however, still have the right because, remember, the cease and desist order that was issued to the airport prohibits them from removing vegetation on their own land.

JUSTICE BORDEN: I'm –

MR. BASHAW: But, yes, Your Honor, the answer to your –

JUSTICE BORDEN: – let's put aside your own land. The other party's land –

MR. BASHAW: Yeah, I –

JUSTICE BORDEN: – are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.

MR. BASHAW: I cannot remove the trees. Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA regulations don't permit me to do it. The DOT can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.

[32] If I do have the property right, which is the facts in this case as determined by the Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland.

JUSTICE BORDEN: Well, I understand your argument. It just seems to me a rather novel use of federal pre-emption.

I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing.

I thought pre-emption is pre-emption and it doesn't matter whether you – well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay.

MR. BASHAW: I think I'll just, since I'm over my time –

JUSTICE SULLIVAN: You've got 21 minutes left.

MR. BASHAW: Good. I'll go into my rebuttal time.

The other portion of pre-emption is conflict pre-emption. I guess I probably won't rehash. The same argument applies to that.

You cannot have exclusive sovereignty of the airspace and you cannot effect the routes of aircraft coming to an airport if, and in this case what will happen is the trees will grow into the glide slope or grow into the RPZ and may grow onto the airport's own land, and they're prohibited [33] from doing it 'cause it's in a wetland or because it's in an area of international importance.

JUSTICE ZARRELLA: But your exclusive sovereignty argument, that depends upon, according to what you just talked to Justice Borden about, that depends upon your having a property right. There's no airspace issue above other people's property unless you have a property interest in it.

MR. BASHAW: If you have the property right, if you have the right to go on – you can't have somebody else come in and then tell you you can't remove those trees, and that was the facts of this case because now I do have exclusive sovereignty.

There is exclusive sovereignty over that particular land. I own it. The airport owned, they owned the land. They have the property right to go in and do the activity.

We have a state and local agency stepping in, saying, No, no, no, no, sorry. We can now allow trees to grow to 70 feet tall in that area, obstructing planes, and the poor pilot who's in the air – on a dark night, this airport has no control tower – is coming in in bad weather, expects that

they're going to have a clear approach slope because every airport is supposed to do it the same way. There's to be national uniformity.

If because some local wetlands agency decides, Nope, we're not going to let you remove those trees in this circumstance, the poor guy or woman is going to hit the [34] tree, they're going to die.

That's why it's so important that there be some uniform standards involved in this, so if you have the right – and, as an overlay to that, courts say you need to have the property rights, you need to acquire the property rights.

JUSTICE PALMER: You couldn't run an airport like that under federal law, though. You couldn't continue to run an airport like that, so you'd have to shut down the airport.

MR. BASHAW: That's correct because –

JUSTICE PALMER: And –

MR. BASHAW: Many airports are funded by the federal government. They get grants; this airport does not.

In order to get those grants, you have to first show the federal government that you have all those property rights. They want to make sure that there aren't going to be problems with towers and trees and houses popping up at the end of a runway that they just spent millions of dollars to help you fund.

JUSTICE BORDEN: Well, then, how did you get the license to run the airport before the 16 years of prescriptive use ran?

MR. BASHAW: Well, when the –

JUSTICE BORDEN: You didn't have any –

MR. BASHAW: Well, there were no trees, Your Honor, back in 1964 and '65. When they constructed the airport, [35] they took all the trees down.

JUSTICE BORDEN: But, certainly, there were trees – the 16 years was from '83 to '99. Right?

MR. BASHAW: Yes.

JUSTICE BORDEN: So, certainly, there were trees in '88, '87, '86, '85.

MR. BASHAW: And, as a matter of course, Your Honor, the evidence does show that some of those trees exceeded this glide slope, and, on a regular basis, the DOT did in fact re-issue the license.

However, that doesn't –

JUSTICE BORDEN: But you didn't have any property right at that point. Your property right didn't ripen until '89.

MR. BASHAW: Well, by then, Your Honor, again, I'm not an expert on tree growth necessarily but, having the trees been cut in 1964 and '65, it's going to take them awhile to grow up until they're actually up into an approach slope, so I don't know how long that takes but there is a certain period of time.

JUSTICE BORDEN: Okay.

MR. BASHAW: I guess at this point, Your Honors, what I will do is reserve the rest of my time to deal with rebuttal to the claims of the appellees.

JUSTICE SULLIVAN: Okay. You have 17 minutes.

MR. BASHAW: For rebuttal. Thank you, Your Honor.

JUSTICE SULLIVAN: Okay. Now, you have 60 minutes [36] but I can't keep track of how you're going to divide it up. You'll have to keep track yourself. Okay?

MR. BRANSE: That's what we intend to do, Your Honor, yes. Thank you.

JUSTICE SULLIVAN: Okay.

MR. BRANSE: May it please the Court, my name is Attorney Mark Branse and I'm representing East Haddam in the Wetlands and Water Courses Commission and James Ventres, who are charged with the enforcement of the state's Inlands-Wetlands Act within the Town of East Haddam.

I will be addressing the alternative grounds for affirmance which is (unclear) the facts of this case do not even present an FAA pre-emption claim.

I will also be addressing the legal aspects of that, and Assistant Attorney General Brooks will also be addressing that.

I will speak for approximately 20 minutes. I'll be followed by Assistant Attorney General Brooks, then by Assistant Attorney General Wrinn, who, between them, will speak for approximately 20 minutes, and, then, finally, Attorney Michael Donnelly who represents the East Haddam Land Trust and also the Nature Conservancy which we're referring to as the Trusts.

Initially, I must start by correcting certain factual misstatements by opposing counsel.

Mr. Bashaw told you that the trees were cut in 1964 and 1965. The testimony in this record by the man who [37] created that airport and numerous other witnesses is that it never looked the way it does today in memory.

The oldest witness, Mr. Gelston, stated that he remembered it looking like that before 1936 when his father cleared hay in that area.

No one could recall this area, as the Trial Court described it, "denuded" the way it is today; no one, not one witness.

It's also been stated that the so-called "5010 report" – that's the DOT report, which is Trial Exhibit 9 and also Exhibit 30; it's at Appendix 68 of our brief – the claim is that it identified the tree line, so-called tree line for removal; that is false.

That report identified seven identified trees scattered across the airport property for removal.

Mr. Mellon asked for permission from the wetlands office to remove those seven scattered trees. The wetlands office determined that the removal of seven trees, like a tree from your backyard, was not a regulated activity and authorized the activity and it occurred.

There was no directive to remove the tree line. It is identified only as what's called a "limiting obstruction".

If Your Honors look at that same report, you will see that the limiting obstruction for Runway 16 is the East

Haddam swing bridge. Does that mean that Mr. Mellon was authorized to demolish the swing bridge?

[38] You will also see that the limiting obstruction for other runways is a hill. Does that mean that he was authorized to remove the hill?

The fact is that that is not what the 5010 report stated, and Your Honors have it before you to check it.

Mr. Bashaw's indicated that the cease and desist order was appealed; it was not appealed. There is a mandatory hearing within 10 days under 22a-44a of the General Statutes. That hearing, as he pointed out, was adjourned because the defendant here, the appellant, objected to the composition of the panel.

Be that as it may, the point is there was no appeal because there was no application. There was not even, under the *Cannatta* and *Wilkinson* cases, an application to the Commission to determine its jurisdiction.

If the claim was that the Commission had no jurisdiction, the property owner could have presented what it is they proposed to do, why they felt that it was a permitted activity, and, if dissatisfied, appealed, but that is not what occurred here at all.

Mr. Bashaw's also indicated that there was testimony about trees, about planes hitting the trees. I hope in his rebuttal you will ask him to tell you where in the testimony that is because it does not exist.

The only accident about which testimony was heard by the Trial Court was a 1991 accident in which a plane cleared the trees and crashed into Chapman pond.

[39] In a trial I asked the appellants' expert witness, Does that mean that Mr. Mellon was authorized to fill in the pond, since that is where the plane actually crashed? The answer from their expert, No, that would no [sic] so authorize it.

Lastly, Mr. Bashaw's told you that pilots expect these clear zones when they land at airports. That is also incorrect.

If the Court looks at the testimony of Warren Standard, who was the designated DOT inspector for this airport, at our Appendix 66, you will see that one of the reasons for the inspections is that the DOT notifies the FAA of observed obstructions, such as the swing bridge or a hill or a tree, and these are placed in notices to pilots, much like the charts that are published for ships at sea.

The problem is you can't put a buoy in the middle of the air the way you can in the water, so the DOT and FAA notify pilots, Be aware when you land at this airport; there's an obstruction and this is what the obstruction is.

So, it is simply not correct that all pilots expect all airports to be clear. In fact, at this airport, at the time that Mr. Mellon purchased it, it had an approach slope of seven to one, as displayed by Exhibit 212 which was the report (unclear) time and also in Exhibit 9.

In fact, through all the inspections between 1978 and 1999, a total of 14 inspections, in only three of them did this airport actually have the required 20 to 1 approach slope and, yet, its license was never revoked.

[40] I also want to comment on this idea of license revocation. What the Court is hearing is a most novel argument.

The argument is that state wetlands laws are pre-empted by state DOT airport licensing laws if they are predicated in some sense on DOT advisory guidelines.

Mr. Bashaw's conceded that the Part 77 surface, as he's describing, are advisory, that they are unenforceable and cannot be mandated, so what he's really saying is that the compulsory element arises from the DOT license and, yet, there is no citation for the proposition that one state regulatory scheme can pre-empt another state regulatory scheme.

I don't think Your Honors will find such a proposition supported by our case law.

The essential element of pre-emption is that the federal government has filled the field. The cases that are cited in their brief deal with, for example, *City of Burbank* where the City attempted to regulate noise.

All of their cases involve situations where some state or local law tried to regulate something that has been extensively regulated by the FAA.

In this case, the wetlands regulations of Connecticut and of East Haddam do not – the East Haddam Commission did not put these trees in, they did not make them grow.

The Commission does not purport to regulate anything about the routes of planes or anything about the operation [41] of an airport. It seeks only to regulate activities within wetlands.

Another statement I should address was that the cease and desist order told Mr. Mellon he couldn't mow his

lawn. He's been mowing his lawn ever since without any objection from us.

The cease and desist order, which the Court can actually view in the record – it is at Appendix page 29 – simply prohibits further regulated activities which have not in fact occurred.

Basically, the appellants here are conceding that the foundation of their pre-emption claim, this Part 77 regulation, is advisory and, yet, they can cite for no proposition, for no authority for the idea that advisory guidelines pre-empt state environmental laws.

When their expert was asked, Have you ever, in your 25 years as an FAA inspector, authorized or directed a violation of a state or local wetlands law, the answer was, and I quote, Oh, no, unquote.

The Mellon parties basically argue before this Court that they have the powers of the FAA without the procedural protections of the FAA.

In the *Flowers Mill* case (phonetic) at page 184, the case describes the process the FAA goes through before it determines what is a substantial obstruction, and it talks about soliciting comments from, and I quote, interested parties.

[42] There's a process, a legal process for determining whether an obstruction is substantial and the Mellon parties and their expert witness conceded that and they concede it in their brief. Yet, it was completely circumvented in this case, so we feel there is no pre-emption based on the facts of this case or based on analysis of the case law.

I would turn, next, to the case of *Avalon Bay*. Basically, their argument is that since this Court would not extend wetlands jurisdiction wherever a salamander may stroll across the countryside, that that holding means that you can turn a flood plain forest into a meadow, that you can flatten every living thing.

I put up a chart over here for the Court that shows this approach slope, and this is from the actual 5010 report, the 1990 DOT report – it's in the record – and you can see that it uses an example, a tree, as a possible obstruction and shows how it's to be dealt with, which is the displaced threshold. It's discussed in our brief.

I think what's important about this is to note that the trees and shrubs that were cut in this case were well below the approach slope. Some of them certainly did protrude into it, but, as the appellants have said in their brief, many did not. There were "innumerable shrubs", to use the wording of the Trial Court, that were below it and yet were cleared.

So, our position is that under the *Avalon Bay* case, this Court never intended that decision to justify this type [43] of activity. If that is unclear, this is certainly a golden opportunity to clarify it and we hope you will do so.

We also feel that Public Act 04209, which we've really briefed, is retroactive and does indicate that the Commission is allowed to regulate the clearing of vegetation.

I'd also point out to this Court something that may be confusing because there's only one memorandum of decision.

The Court did discuss eagles and other wildlife aspects of this property. They discussed it only in the context of the state's CEPA claim.

Relative to the wetlands action, the Trial Court's noted impact was the increase in velocity of storm waters flowing across this cleared property, the increased likelihood of erosion and sedimentation, and both Professor Patten and Mr. Gephardt testified extensively about those effects, so, in ruling on the wetlands action, the Trial Court referenced only physical issues and did not bring up the issue of wildlife until it reached a CEPA claim.

Lastly, I would like to address the issue of remedy.

Basically, our position here is that the Trial Court's decision rewards the shoot-first, ask-questions later mentality.

There are on the Connecticut River many homes that are well over a million dollars, in the millions of dollars. Their value is dependent, in part, on having a view of the [44] river. That view is often blocked by trees.

We have a case here where we have an airport where some planes can land there and some can't. There is no federal law that says there must be an airport for every so many square miles or per county. There is no federal law that says that every airport must be able to accommodate every plane. Some you can accommodate, some you can't, but presumably you can make more money if you can accommodate more planes or bigger planes.

What the Trial Court is saying is that you can cause $150,000 worth of damage, give or take some factor, and pay $17,500 to fix it.

The clear message there is don't apply for a permit, don't seek a declaratory ruling, don't get an order from the DOT or anybody else, just go cut it and you'll get a slap on the wrist.

You'll get a penalty for, certainly in this case and I think in many eases on riverfront properties, is pocket change and that is for remedial legislation which is what the Wetlands Act is; that is not appropriate.

We also feel that the Trial Court erred in stopping the calculation, stopping the calculation clock upon the issuance of the cease and desist order.

The cease and desist order was issued by statute. 22a-44a authorizes commissions to issue orders that say, Stop doing regulated activities, and the purpose of that is in the hopes that these matters can be resolved at the local [45] level, without resort to a court action.

By stopping the calculation of penalties when that order was issued, the message the Trial Court is sending is, Don't issue an order, just go to court.

If this Commission had not issued an order, if it had just brought suit, the penalties would be calculating today or certainly through the end of the trial.

So, the very procedure set up by statute to try to seek local resolution, the process that's set up to protect wetlands has been used to protect the violator, to say, Oh, he was ordered not to do a regulated activity; therefore, he could not do a restoration plan. That is wrong.

The appellants could have submitted a restoration plan any time they wanted; they didn't.

Even under their claims of (unclear) of interest, no later than June 11 of the Year 2001 – and we've included the minutes of that meeting in our appendix – Attorney Bashaw conceded that a quorum of the Commission existed that met his requirements for impartiality and that could hear an application that was actually filed and certainly could have heard a restoration plan.

So, in summary, we feel that there is no pre-emption at fact or at law. We feel that this Court's decision in *Avalon Bay* is not a bar to the Commission's jurisdiction, and we feel that the remedy in this case is so inadequate as to be an abuse of discretion and to undermine the entire purpose of this remedial legislation.

[46] With that, I will defer to my colleague, Assistant Attorney General Janet Brooks.

MS. BROOKS: May it please the Court, I am Assistant Attorney General Janet Brooks and I will spend 15 minutes dealing with all issues of Mellon's appeal of the commissioner's suit and all issues in the cross-appeal with the exception of the issue of personal liability of Mr. Mellon, which will be addressed in five minutes by my colleague, Attorney Wrinn.

I am sole counsel for the appellees who will addressing the CEPA issues in this matter and I will begin there.

There's a CEPA issue within the appeal of Mr. Mellon and that is that he believes Count 3, the only count on which the Court awarded relief, is actually not separate and distinct from Count 1 and is the exact same thing as Count 1 which the Trial Court ruled that no relief could be granted.

This happened at the end of trial – excuse me, not even at the end of trial – when the memorandum was issued. There had been no motion to dismiss or motion to strike and the wording, apparently, feels like a motion to strike from the way the Court ruled.

Count 1, as its captioned in the complaint, was a CEPA count based on the unreasonable conduct to the wetlands and water course.

Count 3, and this can be found in our appendix – Appendix A1 is Count 1; Appendix A6 is Count 3; the CEPA [47] count as to the unreasonable impairment or destruction of the forest – so there are two separate and distinct, at least two separate and distinct natural resources that were adversely impacted by the same conduct, by the clear cutting; that is, there was harm to the wetlands and water courses by the elimination of the 2.5 acres and there was a separate and distinct harm to the forest.

Mr. Mellon argues that it was all really a walking, talking wetlands matter and it should have, the Count 3 should have been subsumed into Count 1 and thereby having all the CEPA counts disappear in accordance with the Trial Court's reasoning, so for all the reasons that are set forth in my brief, the protection of the forest is separate and distinct.

Regardless of whether there was or wasn't an impact to the wetlands or water course, there would be a separate and distinct cause of action to protect the forest.

In the world of environmental protection, this is called "multi-media", that there are multi natural resources that are impacted. This is the bread and butter of what the

commissioner does all the days: evaluate the different impacts arising from the same conduct or same act.

The other aspect of CEPA that is implicated in this appeal is raised in our cross-appeal and that is that Count 1 was erroneously dismissed, if you will, if that's the word, that the Court did on its own in the memorandum of decision.

[48] The Trial Court began in its evaluation of Count 1 by noting that DEP had established, by a preponderance of the evidence, that there was impairment of the wetlands, and it said it was going onto the second step in the CEPA analysis, which is, is it unreasonable and it pointed to *Waterbury versus Washington* which is the appropriate standard to review unreasonableness.

Then, without making any conclusion as to the unreasonableness, using the *Waterbury versus Washington* standard, it moved to the *C Cam* decision (phonetic), and it immediately concluded that a claim or cause of action which notes that there is a failure to have received a license cannot be the basis for a CEPA claim and notes an eight-page swath in the *C Cam* decision.

The *C Cam* decision did find that there is no standing for the CEPA plaintiffs there to pursue their issues of administrative irregularity in the permitting process.

C Cam, the Court noted that there was no allegation of direct harm to the environment, that it was a company operating without a valid permit and without a valid emergency authorization, and there the *C Cam* court said that a claim of an invalidly issued permit does not directly threaten the public trust in the natural resources.

The *C Cam* court took great pains to leave standing as valid law the, commissioner's suits with CEPA counts in addition to claims of a failure to have an environmental permit.

[49] I would direct the Court to pages 140 and 141 where the *C Cam* court catalogued three cases which the commissioner brought a CEPA count in addition to a statutory cause of action; say, a failure to have a solid waste permit, failure to have a water discharge permit and the like.

It particularly said the focus in those cases brought by the commissioner was on the conduct, the polluting or impairing conduct.

Then, the *C Cam* court went and compared *Fish I* to *Fish II* and said *C Cam* is just like *Fish II*. In fact, there were more or less the same plaintiffs in *Fish I* and *C Camp* but *Fish I*, the *C Cam* court said, was an action for injunction for direct environmental harm, consequences of the operation of a cooler water system, but Count 2, just like *C Cam*, was based on administrative irregularities in the permitting process.

The DEP suit here is like *Fish I* for direct environmental consequences of the clear cutting of 2.5 acres of forest in wetlands of international significance.

I say that by going to the complaint itself and, yes, we did plead in Count 1 that there was a failure to have a permit, and why did we do that? Because *Waterbury versus Washington* instructs us that is the measure of unreasonableness.

So, it wasn't sufficient for me to plead that there was clear cutting of trees on the neighbor's property and [50] that that constituted an impairment of wetlands.

It was the clear cutting of trees on the neighbor's property without a permit which constituted unreasonable impairment, so, yes, we had to note that there wasn't a permit for it to succeed in the post-*Waterbury versus Washington* world.

I would also note that the commissioner's suit is not an action against the administrative agency, the East Haddam Wetlands Agency, saying, Why didn't you take some enforcement action? The commissioner seeks relief from the conduct which impaired the wetlands.

JUSTICE BORDEN: So, you're saying that when the Trial Court said that we decided in *C Cam*, I guess it was *Rogue versus C Cam* or *C Cam versus Rogue.*

MS. BROOKS: *C Cam versus Rogue.*

JUSTICE BORDEN: When we decided – the Trial Court was wrong in reading that case as saying lack of a permit itself can't be the basis for a CEPA claim. That's an improper reading of that case –

MS. BROOKS: That's right.

JUSTICE BORDEN: I'm just trying to get your argument – because *Waterbury versus Washington* says that when you're trying to define "unreasonable environmental conduct", you have to look at the statutory scheme that the legislature has set up governing that, and the licensing or the permitting before you do something defines the unreasonableness under *Waterbury.*

[51] MS. BROOKS: Precisely.

JUSTICE BORDEN: All right.

MS. BROOKS: So in that event, we would urge the Court, then, to reinstate Count 1.

There's no need for further action because the Court already found that we proved the impairment by a preponderance of the evidence, so what only would remain is whether it was unreasonable, and that is was the Wetlands Act violated?

The Trial Court made that finding in the joint action brought by, (sic) and the other action brought by the East Haddam Wetlands Commission found there was a wetlands violation.

The importance of reviving Count 1 is if, that's if the appellant, if Mr. Mellon loses on all of its appeal, the importance of winning on this count, reviving Count 1, is not so significant, but if Mr. Mellon persuades this Court that Count 3 is nothing other than Count 1, it really is a walking, talking wetlands violation, then it's of the essence for the commissioner that Count 1 is restored.

I'd like to address a few matters on the pre-emption argument that were not raised; that is, I believe Mr. Bashaw's argument is that field pre-emption, occupation of the field is when you put together all the different layers, you can't come to any other conclusion, then, that the Federal Aviation Law pre-empts or so pervades the field that there can be no conclusion that these environmental laws are [52] pre-empted, but I want to knock down, like bowling pins, some of these essential elements.

One is the runway protection zones.

First, we had Mr. Bashaw admit that once you are at, say, the glide slope, that the glide slope would kick in the ability, at best, to remove the trees or the vegetation above that, the obstruction above it, and he needed to craft an argument that would get to the vegetation below the glide slope. For that he relied on the existence of a circular from the FAA setting out a definition of runway protection zones.

In Mr. Bashaw's appendix at page A51, we'll see why that is not and does not have the effect of law.

The circular begins at A51 and at A52 it says these are recommendations. The use of the standard is mandatory if it's for airports that take federal money.

It's both a fact that it did not take federal money and Mr. Bashaw said this airport does not receive federal money; therefore, its only advisory, Number One.

Then we turn to the actual runway protection zone regulation or advisory comments in question at page A74 of Mr. Bashaw's appendix.

He said that the function of this RPZ is to enhance the protection of people and property. This is achieved through airport-owner control over the RPZ's, and I skip a sentence. Control is preferably exercised through the acquisition of sufficient property interest in the RPZ. I [53] was reading from Section 212.

Going down to Section 212b where it says recommendations, it indicates where the owner of the airport does not have access to the land and does not own the property right to control the use of the land, the RPZ land use standards have recommendation status for that portion of the RPZ not controlled by the airport owner.

So, we've eliminated the RPZ's so we don't have any authority that Mr. Bashaw provides for the cutting below the slope zone.

Then we have the Trial Court and not only the *Catchings* case but also – the *Catchings* case that tells us that the Part 77 regulations which establish and identify obstructions are just a tool for evaluating where an obstruction exists.

In fact, this Court had an opportunity in answering a certified question from the Second Circuit, looking at an abrogation easement, to examine what happens – that's the *County of Westchester versus Greenwich* in the early '90s – to examine what happens when there are obstructions in the glide zone, and, in fact, this Court noted that the consequence of having a high obstruction is not in the height of the trees – there, there were also high trees – it's on the length of the runway, and the Court noted in that case that that runway was displaced, its threshold was displaced, reduced by over a thousand feet.

So, for all of those reasons, I don't believe there [54] is any pre-emption in this matter, and, at best, it would never have protected any environmental regulation below the glide path, even if the Court were to find federal pre-emption.

At this point, I will turn it over to Attorney David Wrinn.

MR. WRINN: May it please the Court, I am Assistant Attorney General David Wrinn. I also represent the Commissioner of Environmental protection in this matter.

I'm confining my remarks in haste to a single issue, and that is Mr. Mellon's personal liability.

The brief that the commissioner has filed has set forth in a great deal of detail the matter here, which is one of action and participation and not one of status or vicarious liability or derivative liability, marking in that way a major division between responsibility under background principles of tort and environmental remedies and the territory that belongs to the corporate forum and such concepts as piercing the corporate vail.

This case has nothing to do with matters of the misuse of the corporate forum and everything to do with what Mr. Mellon personally undertook under the facts of the case and as found by the Trial Court.

The Trial Court –

JUSTICE BORDEN: You're saying, Mr. Wrinn, that when we're in the environmental area, if the nominal acter [sic] is a corporation, we don't use the normal piercing the corporate [55] vail.

If the nominal acter [sic] is a corporation but, obviously, corporations can only act through their agents who are human beings, the normal rules of piercing the corporate vail for attaching personal liability to the agent of the corporation, those rules don't apply; we have a different set of rules.

Is that what you're saying?

MR. WRINN: That's correct and in the *BEC* case, which I argued to this Court four and a half years ago, that decision lays out with great care and particularity precisely that divide and how that works; that a

corporate officer is, and has always been under the law of this state, responsible for the torts in which he participates.

Also, he would be equally responsible for the environmental statutes that he violates.

In the *BEC* case we have the Connecticut Water Pollution Control Act. In this case we have CEPA as the statutory source of the violation.

In fact, we have a supplemental environmental statute which strives to protect the public, the public trust, and in that context our claim is that Mr. Mellon actively participated in the destruction, the clear cutting of two and a half acres of flood plain forest in an area that has, indeed, international significance.

Mr. Mellon testified that he took responsibility for whatever Mr. Evans cut: Whatever he cut was on my [56] instructions because I told him to cut.

Mr. Evans basically testified that he was told by Mr. Mellon to, quote, cut everything regardless of size or species. Again, when asked who directed Mr. Evans to cut these trees, Mr. Mellon responded, I did.

So, without doubt, this is a case that readily, easily falls into the category of corporate officer participating, along with the corporate entity, in the violation and in the acts complained of which would be the violation of CEPA.

By the way, it would also be a violation of the Wetlands Act for all the same reasons.

In summary, again, looking to the analysis in *BEC* which treats the special circumstance of a statute but also

the background circumstances of the common law as they (unclear) environmental protection remedial legislation to effect the sound policy of the protection of natural resources of this state, there is nothing in either statute that would preclude Mr. Mellon from being held liable on the same analysis that the *SEC*, court reviews in the process of having determined in that case Mr. Irvin Shiners' (phonetic) responsibility for the (unclear) that occurred in that case.

The only thing that the appellants can point to is a section of the Limited Liability Act, and that is 34-134 which is entitled Members and Managers as Parties to Action, but I would assert to you that that says no more than is the law in this state with respect to corporations of any [57] description, which is that you don't make an officer liable merely because of his status.

We haven't done that. We alleged that he involved himself in certain actions and the proof of trial more than corroborated this, proved it.

That section, 34-134, says that: A member or a manager of a limited liability company is not a proper party to a proceeding by or against a limited liability company solely by reason of being a member or manager of the limited liability company. (End of reading)

That just restates the same learning that can be found in the *Scribner versus O'Brien* case and *Kilduff versus Adams*, both of which cases, by the way, are discussed in the *BEC* analysis where those corporate officers were deemed responsible for having undertaken a responsible share in the actions that led to the violation of the statute, so it's no different here.

In summary, what this case is about is about participation; it's not about status.

Thank you.

MR. DONNELLY: May it please the Court, my name is Mike Donnelly. I represent the trust defendants in this case; that is, the East Haddam Land Trust and the Nature Conservancy.

By Way of background, these parties are non-profit landowners who own the property on which the cutting in question took place; that is, the two and a half acres to [58] the south of the runway.

They hold these properties in trust for future generations. These are not commercial properties. They are, in fact, held in as close to a natural state as is reasonably possible.

The trust parties believe that the Trial Court's decision should be upheld with respect to the pre-emption issue and with respect to the CEPA issue that you've just heard counsel for the Inland-Wetlands Commission and the DEP talk to. We adopt their positions and I will not be speaking on them.

I'm going to turn, instead, to the portions of the cross-appeal where the trust parties are seeking affirmative relief from this Court. There are three items that, time permitting, I would like to touch on.

The first is the question of the prescriptive easement. The second is the Trial Court's striking of the unfair-trade-practices claim, and the third is our request for a remand for a hearing in damages under Section 52-560.

Of these three items, by far the most important to the trust parties is the question of prescriptive easement.

I'm not, frankly, sure whether counsel for the Mellon parties was addressing the scope of the easement or whether he was arguing pre-emption in portions of his discussion, but I think it's important to correct at least the implication that was given with respect to what the Trial Court held as to the existence of an easement.

[59] I would like to read what is found at page 27 of the decision, which I believe is on page 61 of the final appendix that was filed recently by counsel for the Mellon parties.

The Trial Court found, quote, a prescriptive easement to go onto the two-and-a-half-acre area on occasion and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway, closed quote.

You have, I believe, heard counsel for the Mellon parties say that that would permit the airport to go onto the Land Trust property and cut a ten-foot tree or shrub if the airport could get one of its pilots to complain about that tree or shrub.

That is absolutely a guarantee of future litigation between these two parties.

The Land Trust and the Nature Conservancy hold property in trust. It is their duty to reinstate this flood plain forest for the purposes of protecting Chapmans Pond.

The Trial Court found a variety of impacts which result from the removal of the flood plain forest, scouring the like.

The airport you have heard indicate that it believes that as long as it has this complaint from a pilot, it can go and cut virtually anything on the property.

The Trial Court erred by granting this ill-defined easement.

JUSTICE BORDEN: Mr. Donnelly, was there any evidence [60] presented by the airport defendants that would have justified a more narrow and clearly-defined easement than the Trial Court granted?

I mean, they –

MR. DONNELLY: That's a complicated question, in my mind at least.

There was evidence presented that, almost on random occasions, the predecessor operators of the airport went in and cut or trimmed – it was not clear which – on occasion to take out certain limbs, sometimes certain trees at other times.

The evidence that was presented to the Trial Court is clear, though, with respect to contemporaneous documents from the DOT files that, from the period in 1978 through 1994, this 20 to 1 glide slope that we've talked about was virtually never in place. It ranged from 7 to 1 in 1978 – I'm sorry – 14 to 1 in 1978 to 7 to 1 in 1999.

JUSTICE BORDEN: Well, let me put it another way. Maybe this will answer my question.

I take it there were trial briefs in this case –

MR. DONNELLY: Correct.

JUSTICE BORDEN: – and one of the claims of the airport defendants was that they had proven a prescriptive easement.

MR. DONNELLY: Correct.

JUSTICE BORDEN: In their final brief to the Court, to the Trial Court, did they define the scope of their [61] claimed proven prescriptive easement with any more particularity than the Trial Court formulated?

MR. DONNELLY: My understanding of their claim has always been that the clear cutting was within the scope of their claimed easement.

JUSTICE BORDEN: So their claim was that they had an easement to go in and do what they did to begin with.

MR. DONNELLY: Correct.

I believe Mr. Mellon's test –

JUSTICE BORDEN: And the Trial Court didn't give them that but he gave them this kind of –

MR. DONNELLY: – ill defined.

JUSTICE BORDEN: – what you call "ill defined". All right. Thank you.

MR. DONNELLY: And, in fact, based on the ill-defined nature of the easement, I filed a motion for articulation, and the Trial Court's response to that was an acknowledgement that it could not articulate the easement any more clearly than it did under the circumstances of the case.

It is our view that this ill-defined easement is contrary to repeated findings and holdings of this Court which has repeatedly said that it is the duty of a party which is seeking to obtain an easement to define the boundaries with some particularity.

The boundaries that were talking about here are boundaries not only of length and width but, by virtue of [62] what we're talking about, they are boundaries of height of the trees.

I suppose that there is an alternate possibility but it was never really raised, which is cutting on a periodic basis to the ground, let them grow up and cut them down again ten years later, but there was neither any evidence of that nor was there any claim that that's where we're going.

What we were talking about is, essentially, a three-dimensional path and it has not been defined, and I submit that under the holdings of this Court, as a result, the determination of the Trial Court should be reversed; there is no need to remand on this issue.

In addition, the Trial Court also erred by finding an easement despite the fact that there was a boundary-line agreement between the predecessors of the two parties. The boundary-line agreement is part of the record.

The boundary-line agreement is what set – you heard Attorney Bashaw indicate that the boundary between these two parties was the middle of the creek. The boundary-line agreement is the document that set that boundary.

It was signed by both the predecessor to the Land Trust and the predecessor to the airport, and, according to the terms of the document, which, again, are within the

record, the airport gave up all rights essentially to do anything on the southern part of that boundary line.

In exchange, the predecessor to the Land Trust gave up its rights to do anything to the north of that boundary [63] line except to pass and re-pass along a road that's on the airport property.

JUSTICE BORDEN: Why is that inconsistent with – putting aside the lack of particularity, why is a boundary-line agreement necessarily inconsistent with a prescriptive easement?

It seems to me that, if anything, it could support it because one of the – oh, I guess your argument is if you know you've given up your rights to the property south of you, you can't be claiming that you're doing this cutting as of right (unclear).

MR. DONNELLY; I believe that that is true; that is my personal belief.

I don't know that that, frankly, is consistent with what this Court has held in the past. "As of right" is a little bit of a tricky issue, I think, to this Court at times.

What is more important with respect to the boundary-line agreement is Section 47-38 of the General Statutes.

That is a mechanism by which a party which has its property under attack, if you will – someone is seeking to obtain an easement over it – that party does not have to go to court, that party does not have to result to self-help.

Instead, under Section 47-38 it can give written notice to the other party that it maintains that it owns the property in question, and from there it has to serve this

notice on the other party and then file it on the land [64] records.

What we have here is a notice signed by both parties. It is not just served. It is, in fact, an agreement of the two parties, signed by each party, and it was filed on the land records.

In *Crandall v. Gould* this Court analyzed 47-38 and found that when it is in place, when the notice has been given, that this stops the running of the prescriptive time period for all time going forward.

In *Crandall v. Gould* what was actually in place was an injunction. It was not an agreement. It was an injunction but the Court found that the injunction satisfied the 47-38 requirements, the notice requirements under 47-38 and that it stopped the running.

The offending activity in that case began, again, shortly after the injunction was entered and ran for some 29 years after that, although I believe in my brief I say it was 19 years. That's a typographical error. It's 29 years afterwards, well beyond the 15 years, but the Court, this Court said that's not good enough. Under 47-38, it's over. You can't start a new prescriptive period. The Trial Court never even addressed the 47-38 issue.

JUSTICE BORDEN: Tell me again why – I mean, the typical 47-38 notice is Property Owner A files a notice on the land records, saying, I own this land – puts a boundary description – and that means that my neighbor who has been entering on this land, cutting down trees or digging up [65] whatever, from that day forward any prescriptive use by the neighbor stops.

Now, fit the boundary-line agreement into that for me, into that scenario.

MR. DONNELLY: Sure. You and I are neighbors and I'm cutting your trees and, instead of you writing –

JUSTICE BORDEN: Oh, I own here, you own there.

MR. DONNELLY : Right.

JUSTICE BORDEN: Whatever you think you can do, the land record says you can't do on my land.

MR. DONNELLY: And, not only that, we shake hands instead of the typical situation where you have a sheriff give the notice.

JUSTICE BORDEN: All right.

MR. DONNELLY: With respect to each of these issues, there are no issues of fact. There are merely questions of law and, as a result, again, we ask that this Court simply reverse the finding that there is a prescriptive easement and there is no need for any additional action with respect to the prescriptive easement.

We do, however, ask that this Court remand the Case with respect to the unfair-trade-practices claim.

Now, I'd like to point out –

JUSTICE SULLIVAN: With respect to what? I didn't hear you.

MR. DONNELLY: The unfair-trade-practices claim.

Now, the Trial Court's decision indicates incorrectly [66] that we waived our rights under the unfair-trade-practices claim 'cause we failed to brief it.

When the Court looks at the record in detail, it will see that we didn't brief it because the claim had already been stricken.

The rationale that the Trial Court gave for striking the claim was that these two parties are not consumers or competitors. They don't have a consumer or a competitive relationship.

However, this Court has never held that there is a requirement for a consumer or a competitive relationship but, rather, that allegations fit within the cigarette rule, and I think the most recent decision on that came out two days ago.

Here, set forth in our, I believe, original brief to this Court, we have set out the entirety of our unfair-trade-practices claim.

We believe that it does comply with the cigarette rule; that is, that the allegations are essentially a straightforward slap suit and, as a result, the actions of the airport in both cutting the trees and in filing litigation against the individual members of the Land Trust, as well as claims against the Land Trust itself, offends public policy, is immoral, oppressive, unethical and unscrupulous and it does substantial [sic] injure business persons in that the Land Trust and the Nature Conservancy are business people.

[67] It's a non-profit business but they are, in fact, in the business of maintaining property.

For this re –

JUSTICE BORDEN: So it's the slap suit allegation that forms the crux of your CUTPA claim.

MR. DONNELLY: Correct.

The other item for which we seek remand is for damages under Section 52-560 which is the tree-cutting statute.

Below, we had a licensed arborist who was going to testify with respect to the replacement value of the 300-or-so trees that were cut down on our property.

The Trial Court relied on a case called *Flint v. Lincoln* in order to keep us from presenting this evidence.

The decision in *Flint v. Lincoln* basically turns on – I should take a step back. 52-560 provides for treble damages for the reasonable value of trees that are taken out on another person's property.

Flint v. Lincoln, and a handful of lower court other than that, have held that the reasonable value of trees is calculated in one of a couple of ways but not for replacement value; that is, typically it's the cord wood value of the wood as firewood or as timber, or it is the value of the property before the cutting with the trees on it and after – essentially, an ornamental value.

With all due respect to the Flint Appellate Court, that does not fit these circumstances.

[68] The value of this property, as the Trial Court found, is as a buffer to Chapman Pond. It is held in the public trust for that purpose and, as a result, it has relatively little commercial value, as would any land trust

property; relatively low commercial value once the requisite easements are placed on it that give the tax-exempt status for the donation of property to land trusts.

As Attorney Branse said earlier, we are in age now where there are multi-million-dollar houses. It is absolutely the wrong message.

It is absolutely, in my view, inconsistent with the wording of 52-560 with respect to the reasonable value – with providing damages as to the reasonable value of the trees to allow someone to go onto a neighbor's property to improve their view or to improve the glide path to their runway, to allow them to take out the trees and then simply have to pay for firewood value for that property.

We are not looking – the other thing that the Trial Court focused on with respect to rejecting our presentation of this evidence, granting a motion in limine not allowing our arborist to testify, was the difficulty you would find in analyzing the replacement value: how to deal with healthy trees, how to deal with trees that are older, how to deal with the spacing of trees.

I submit, that that is a red herring because quite frankly, that type of analysis is exactly what trial courts do all the time with real estate appraisers.

[69] Real estate appraisers look at comparable properties and then adjust them upwards or downwards, depending on whether this house is in better condition, that neighborhood is a better neighborhood.

There is nothing inherently impossible about making the same kind of analysis with respect for the replacement value of trees, particularly in a circumstance like here where the value of the property is for the public trust. It is

to protect Chapmans Pond in this area of international significance.

With that, unless there any questions, I'll step down. Thank you, Your Honors.

JUSTICE SULLIVAN: Okay.

MR. BASHAW: Again, for the record, John Bashaw, representing the appellants. So many issues; so little time.

Let me touch – I think what I'll do is I'll work backwards if the Court will permit.

With respect to the 52-560 claim, which is the value of the timber that was cut, we obviously agree with the *Maldonado* decision and with the *Stanley* decision.

It is inherently difficult to value these trees. Half of the trees that were cut on this property were of a species known as Ilanthis Eltisima (phonetic) which all parties agree is an invasive spore and species that nobody wants on this property. How do you value what, essentially, is a junk tree?

[70] I guess all trees have value but for purposes –

JUSTICE BORDEN: Well, if that's the case then if it can't be valued, then presumably the plaintiff, with respect to those trees, would lose its proof, wouldn't persuade the Court that there was any value lost.

MR. BASHAW: Then –

JUSTICE BORDEN: Why shouldn't they be entitled to at least be able to prove the replacement value of trees that aren't junk trees?

MR. BASHAW: Well, I guess it's similar, Your Honor, to all sorts of types of expert testimony that is just inherently unreliable that's not permitted to be allowed in court.

For example, in this case they also said the val – what about the trees that are rotten? How do you value the trees – how do you put a value on a tree that has a rotten bowl inside the tree and the tree is dead? All right. And there is evidence.

If you look in the record, there is a report by Dave Edson – he's one of the forestry experts – he (unclear) find that a lot of the trees that were cut were rotten.

Well, they may have a value to a woodpecker but –

JUSTICE BORDEN; Well, but, I mean, I don't know of any general rule of – I mean, I know we have these cases that say, at least in tort cases generally that if you're looking at, if someone comes along and mistakenly chops down your tree in front of your house, that generally the value is the [71] value of your property with and without the tree, not how much would it cost to replace the hundred-year-old oak tree.

Do we do that because – is that the rule because you're never going to be able to prove it?

MR. BASHAW: According to my understanding of the cases that have been cited today, Your Honor, that is the decision (unclear).

It's inherent – I can only use the language of the (unclear) – it is inherently incapable of being determined, and so the Trial Court has set three different alternatives for establishing value, and they attemped [sic] to put

nobody on to testify to any of those other values, market value. They didn't put anybody on.

They wanted to come in and talk, have somebody come in and talk about replacement value, and their claim is, according to their brief anyway, it's because this is a different type of property.

Well, the Court's decisions in the past are not based upon the type of property on which the tree was cut; it's based upon the methodology. The methodology's just inherently impossible to apply.

Moving to the CUTPA claim, this is not a slap suit. Remember, it was the Inland-Wetlands Commission that sued the Land Trust. The airport parties didn't sue the Land Trust. They got brought in because they were the owners of the property, so this is not a slap suit.

We didn't file suit against the Land Trust and the [72] individual members in these cases. They were brought in by another party, and to then propose a theory of law that says because an individual has resources, economic resources to defend himself in a claim, that that somehow is unscrupulous, immoral, unethical?

The Court has never ruled that way, and despite the fact that there's no business relationship at all either, which is a prerequisite to CUTPA, So I think the Trial Court ruled correctly in striking their CUTPA claim.

With respect to the prescriptive easement, I think I just want to clarify a few items by Attorney Donnelly. If you will bear with me, I'll get the reference from the brief.

I think Attorney Donnelly said that the trees, I guess, all that was shown that they were cut on – oh, I think he used the words "random occasions".

Well, in page 26 through 28 of the airport parties' reply brief in this matter is set forth in detail the actual testimony that was provided to the Trial Court by the witnesses who were present while all this tree cutting activity occurred.

I don't need to recite it since my time is limited here, but I would refer the Court to those sections where those witnessses [sic] tell in detail how the trees were cut. They were cut by chain saw, openly, during the daytime. They were cut every four to five years on a more extensive basis and every year as pilots complained about [73] the trees.

With respect to the claim that there's no evidence about the height at which the trees were cut, again, attached as exhibits to the reply brief are actual color photographs taken from the DOT file that show, over time, a distinct notch, the U-shape, if you will, where the cutting had occurred, so that gives some representation to the Trial Court that, clearly, there is a difference in height between the two sides where no cutting occurred and where the cutting did occur.

That –

JUSTICE BORDEN: When you made your, final claim for prescriptive easement in the final briefs, I take it you had some presentation to the Trial Court of what you, wanted your prescriptive easement to be. What was it?

MR. BASHAW: Well, we recited – Your Honor, it is actually our position in this case that we should have

the right to cut the trees as they did because of the cutting that occurred in 1964 and '65.

Now, I think I stated clearly and correctly in my earlier presentation that a larger area was cut in the '64-'65 time period and some small trees were left in that area, so I do not disagree with the representation by Attorney Branse that the area never looked like it did in 2000. There may have been a few trees left in '64, '65, based upon review of aerial photographs by an expert by the name of David Edson, and his testimony is in the record, so [74] with that exception, with the presence of a few trees in that area, I believe that the airport had a larger right to cut the trees than what the Trial Court required.

However, in this case there was plenty of evidence to support the decision that the Trial Court reached. We think the scope was broader but we think there was evidence certainly to support what they reached.

JUSTICE BORDEN: Well, but what do you say to Mr. Donnelly's claim that generally our cases say that if you have a prescriptive easement, the person claiming it has to do it with reasonable specificity?

MR. BASHAW: Well –

JUSTICE BORDEN: Do you agree that that is the general standard?

MR. BASHAW: Well, I agree that that is the general standard and obviously the facts –

JUSTICE BORDEN: Well, what is at all specific –

MR. BASHAW: Well –

JUSTICE BORDEN: – about as necessary to what? To produce safety.

MR. BASHAW: Well, obviously, Your Honor, I mean –

JUSTICE BORDEN: It doesn't say where, doesn't say, you know –

MR. BASHAW: Well –

JUSTICE BORDEN: – from time to time?

MR. BASHAW: Well, actually –

JUSTICE BORDEN: It doesn't say where, when, how.

[75] MR. BASHAW; Well, actually, Your Honor, again, I'll reference you to the pages of the brief, of the reply brief I just did because the Court did say there was evidence of where it occurred.

It occurred in the area in which the cutting occurred, which is a fairly well-defined area, in December of 2000. It is well defined as to when it occurred.

It occurred every four to five years on a more extensive basis where they would go out and cut for two to three days and then every year on an occasional basis, as somebody would complain about a limb that got in the way or one tree that had popped up out of the canopy that needed to be cut down.

I don't think anybody could ask, somebody to say specifically, well, exactly how many trees did you remove each and every single time and exactly where on that 2.5 acre parcel?

That's impossible to discern other than them saying it was in, again, the photographs show where that cut area is. They clearly show where the cutting occurred. They show the relative height to what the trees were cut.

In fact, some of those photographs even provide written on them the glide slopes, so that will also give you some indication of the height of the trees.

JUSTICE BORDEN: What do you say to his argument about the boundary-line agreement?

MR. BASHAW: Well, first of all, the handshake, I [76] think he referred to the handshake agreement between the parties wasn't between my client and –

JUSTICE BORDEN: Well, it doesn't matter. Were talking about –

MR. BASHAW: But –

JUSTICE BORDEN: – we're talking about a boundary-line agreement which is recorded on the land records which everybody says, I give up my rights to your property, you give up my (sic) rights to my property.

MR. BASHAW: But for purpose –

JUSTICE BORDEN: Why doesn't that perform the function of the statutory notice?

MR. BASHAW: Because, as I understand it, Your Honor, for purposes of establishing that claim under 47-38, under Section 47-39 you actually have to serve that document on the party against whom you're saying, trying to defeat the prescriptive easement from running.

Filing it on the land records is not enough. You have to serve it as if you were serving a civil complaint; that's in 47-39. They didn't satisfy the prerequisites for establishing a cause of action under 47-38.

JUSTICE BORDEN: Even though it was signed.

MR. BASHAW: But it was signed by a prior party to the airport, and that's the reason, Your Honor, I believe –

JUSTICE BORDEN: Well, what difference does that make? I mean, there, the –

MR. BASHAW: Well, because you're trying to take a [77] right away from somebody, Your Honor, and that's why I believe there's a requirement for service.

JUSTICE BORDEN: Look, Mr. Bashaw, if A and, B own the adjoining properties at one point and they come to a boundary-line agreement and they sign it and they serve it – they each give a copy to a sheriff and he serves it on each other – and let's suppose, you know, it says, and this is under 47-38 – now your client comes along and buys the property from A and B. The fact that your client didn't sign it doesn't insulate your client from the effect of it.

MR. BASHAW: Well, I –

JUSTICE BORDEN: You take whatever rights or liabilities your predecessor in title takes. Are you saying that 46-38 has to be renewed every time there's a transfer of title?

MR. BASHAW: I believe, Your Honor, what the law requires, and I'm only reading what 47-39 requires,

that the person against whom you're trying to stop the running of an ongoing prescriptive easement, it has to be served on them.

JUSTICE BORDEN: Is that your only argument –

MR. BASHAW: No, it is not, Your Honor.

JUSTICE BORDEN: – for the invalidity of that?

MR. BASHAW: I also believe, I agree with the Trial Court's ruling that even if 47-38 applied, it only stops to cease whatever continuing prescriptive easement might be running at that particular point in time. It doesn't prohibit it from re-establishing itself at some point in [78] time.

The Trial Court said, and I agree, there is a distinction between *Crandall versus Gould*, which was a judicial, it was a permanent injunction that was issued against a property owner and the Court said, for that purpose, as a matter of public policy, we're not going to let somebody come in and violate a permanent injunction for the purpose of establishing a prescriptive easement.

JUSTICE BORDEN: So, then, it only stops it but it doesn't prevent it from starting up again?

MR. BASHAW: I agree, yes, Your Honor.

JUSTICE BORDEN: So, then, if they have two property owners and one property owner realizes that the other property owner is encroaching on his land, trying to get in a prescriptive easement, so he creates a document under 47-38, serves it on the other party, okay, records it on the land record, and the other party stops for 30, 60, 90 days, six months a year, and then starts up again.

The 47-38 document has no effect?

MR. BASHAW: I believe that's correct, Your Honor.

JUSTICE BORDEN: Okay. Not much of a protection, then,

MR. BASHAW: I believe that that's what the law requires, though, and that's what the courts have held.

I also want to make sure that I believe, and Attorney Donnelly was talking about the, he read right from the Trial Court's decision about what the prescriptive easement [79] provided, and I don't think he was claiming that I mischaracterized it 'cause I think I did characterize it correctly, which is the prescriptive easement exists and is triggered by complaints from pilots and by a determination by a DOT that trees need to be removed.

I believe that's what I said in my earlier arguments, and I just want to make sure that I did not misrepresent that fact.

With respect to the personal-liability issue addressed by Attorney Wrinn, this is a single-member LLC, of course, and Mr. Mellon is that single member, so, of course, he will be the one who speaks to a contractor to go do work.

He will be the one who signs the check on behalf of the LLC. That's unavoidable when you have a single-member LLC. I don't know what that gets him as far as the facts of this case.

JUSTICE BORDEN: What about the *BEC* case?

MR. BASHAW: Well, the problem with the *BEC* case, Your Honor, is that case was limited, first of all, explicitly by its own terms of the Water Pollution Control Act. Secondly, that was the Responsible Corporate Officer Doctrine that was established by the Court.

Now, in this case – in the Water Pollution Control Act, under the definition of "person", they specifically included officers, directors, a basis that gave the Court to set a responsible corporate officer policy.

The Inland-Wetlands Act, with respect to an action [80] under 22a-44b, which is the cause of the action brought by the inland-wetlands case (sic) in this case, it doesn't include reference to corporate officers, directors, etc., the same language used in the Water Pollution Control Act, and, importantly, Section 22a-44c of the Inland-Wetlands Act, which is for knowing violations of the act, it specifically does include officers and directors.

So, for some reason, the legislature made a decision that, with respect to an action under 22a-44b, we're not going to include officers and directors.

JUSTICE BORDEN: Well, if Mr. Mellon, instead of ordering these trees cut down, were driving an automobile –

MR. BASHAW: I'm sorry, Your Honor, was –

JUSTICE BORDEN: If Mr. Mellon, instead of ordering these trees cut down, had been driving an automobile owned by the LLC and injured somebody, or let's suppose if Mr. Mellon, instead of ordering these trees cut down, drove off the road and rampaged through the land trust property and knocked over trees and shrubs and damaged the ground, he would be not only the LLC by

vicarious liability, assuming he was in the business of it, he would be personally responsible for that tort.

MR. BASHAW: Sure. I don't disagree with that, Your Honor. You're –

JUSTICE BORDEN: Why should he not be personally responsible for this just because he was the LLC officer doing it?

[81] MR. BASHAW: Well, Your Honor, I responded to your question regarding *BEC*, so under the Responsible Corporate Officer Theory of Liability, I don't think it exists in this case.

What you're talking about are some of the other theories of law that are proposed by the –

JUSTICE BORDEN; But in *BEC* we said that's consistent with the fact that corporate officers are personally responsible for the torts that they commit.

MR. BASHAW: I don't disagree with that theory of law that if you commit your own tort, you're responsible for it, but my response to that, Your Honor, is to actually look at the actual complaints that were filed in this matter and, in particular, if you look at the inland-wetlands complaint – I'll use that as an example – in Paragraph 5 of their complaint they identify Timothy Mellon in this case as "the defendant, Timothy Mellon, as a member, manager and owner of Goodspeed."

They don't make any allegations that he's liable because he's assisted in a violation, he's cooperated in a violation or participated in a violation. He's named as a member, manager and owner of Goodspeed.

That is the only basis they name him in their complaint on it, and under Section 34-134 that's prohibited; you can't do that.

If you also look at the DEP's complaint and you look at how they name Mr. Mellon, they name Mr. Mellon a member, [82] manager and owner of Goodspeed Airport, LLC.

Now, at trial did they proceed to, then, establish evidence that he spoke to Mr. Evans and he wrote the check? Yes, single-member LLC. He'd be the only one to do it but they didn't plead it. That's our response to that.

JUSTICE BORDEN: Well, was there any claim that he couldn't be held liable because of the pleading?

MR. BASHAW: There was a – the airport parties moved at trial to have all personal liability stricken from the case, and the trial judge denied that reque...

Your Honor, my time is up. I thank the Court for listening to the arguments today, and I obviously refer the Court to many of the arguments that I was not able to make today are set forth in our briefs, and I ask the Court to review the briefs.

Thank you very much for your time.

JUSTICE SULLIVAN: Thank you, Counsel.

(The hearing is ended.)

SC17280 TTD

JAMES VENTRES ET AL.

v.

GOODSPEED AIRPORT, LLC, ET AL.

CERTIFICATION

I, Joy E. Franklin, do hereby certify that the foregoing pages are a true and accurate transcription of the tape in the above-entitled matter heard in the Supreme Court by Chief Justice William Sullivan, Justice David M. Borden, Justice Flemming L. Norcott, Jr., Justice Richard N. Palmer, and Justice Peter T. Zarella on April 14, 2005, in Hartford, Connecticut.

Dated this 18th day of December, 2005, in Hartford, Connecticut.

/s/ Joy E. Franklin
Joy E. Franklin
Court Monitor

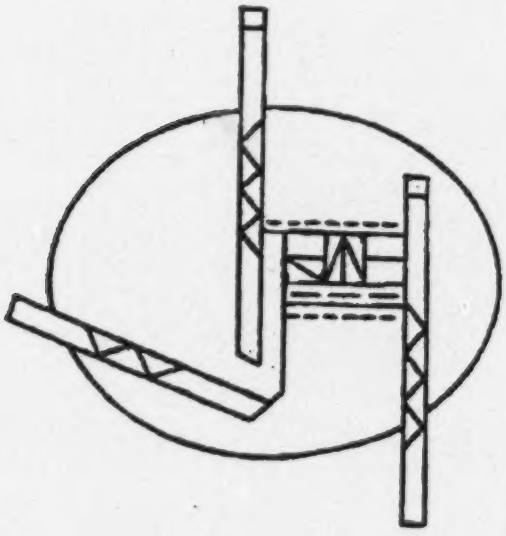
US Department of Transportation
Federal Aviation Administration

AIRPORT DESIGN

/INCORPORATES CHANGES 1 THRU 5/

AC: 150/5300-13
Date: 9/29/89

Advisory Circular



[LOGO]
U.S. Department
of Transportation

**Federal Aviation
Administration**

**Advisory
Circular**

Subject: AIRPORT DESIGN

Date: 9/29/89 **AC No:** 150/5300-13
Initiated by: AAS-110 **Change:**

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1. ***PURPOSE.*** This advisory circular (AC) contains the Federal Aviation Administrations (FAA) standards and recommendations for airport design.

2. ***CANCELLATION.*** This (AC) cancels the following publications:

a. AC 150/5300-2D, Airport Design Standards – Site Requirements for Terminal Navigational Facilities, dated March 10, 1980.

b. AC 150/5300-4B, Utility Airports – Air Access to National Transportation, dated June 24, 1975.

c. AC 150/5300-12, Airport Design Standards – Transport Airports, dated February 28, 1983.

d. AC 150/5325-5C, Aircraft Data, dated June 29, 1987.

e. AC 150/5335-2, Airport Aprons, dated January 27, 1965.

3. ***APPLICATION.*** The standards and recommendations contained in this advisory circular are recommended by the Federal Aviation Administration for use in the

design of civil airports. For airport projects receiving Federal grant-in-aid assistance, the use of these standards is mandatory. At certificated airports, the standards and recommendations may be used to satisfy specific requirements of Federal Aviation Regulations (FAR) Part 139, Certification and Operations: Land Airports Serving Certain Air Carriers, Subpart D.

/s/ Leonard E. Mudd
Leonard E. Mudd, Director
Office of airport Safety and Standards

Chapter 2. AIRPORT GEOMETRY

200. ***INTRODUCTION.*** This chapter presents the airport geometric design standards and recommendations to ensure the safety, economy, efficiency, and longevity of an airport.

201. ***PRINCIPLES OF APPLICATION.***

a. *Need to Plan.* The significance of the interrelationship of the various airport features cannot be overemphasized. It is important that airport owners look to both the present and potential functions of the airport.

(1) Existing and planned airspace required for safe and efficient aircraft operations should be protected by acquisitions of a combination of zoning, easements, property interests, and other means. AC 150/5190-4, A Model Zoning Ordinance to Limit Height of Objects Around Airports, presents guidance for controlling the height of objects around airports.

(2) All other existing and planned airport elements, including the following, should be on airport property:

(a) Object free areas;

(b) Runway protection zones;

(c) Areas under the 14 CFR Part 77 Subpart C airport imaginary surfaces out to where the surfaces obtain a height of at least 35 feet (10 m) above the primary surface; and

(d) Areas, other than those which can be adequately controlled by zoning, easements, or other means to mitigate potential incompatible land uses.

b. *Airport Functions.* Coordination with the FAA and users of the airport should assist in determining the airport's immediate and long range functions which will best satisfy the needs of the community and traveling public. This involves determining the following:

(1) The operating characteristics, sizes, and weights of the airplanes expected at the airport;

(2) The airport reference code (ARC) resulting from (1);

(3) The most demanding meteorological conditions in which airplanes will operate;

(4) The volume and mix of operations;

(5) The possible constraints on navigable airspace; and

(6) The environmental and compatible land-use considerations associated with topography, residential development, schools, churches, hospitals, sites of public assembly, and the like.

c. *Airport Layout Plan.* When developing the airport layout plan, application of the standards and recommendations in this publication to the long range functions of the airport will establish the future airport geometry. See appendices 6 and 7 for detailed information on the development of the airport layout plan.

202. *RUNWAY LOCATION AND ORIENTATION.* Runway location and orientation are paramount to airport safety, efficiency, economics, and environmental impact. The weight and degree of concern given to each of the following factors depend, in part, on: the airport reference code; the meteorological conditions; the surrounding environment; topography; and the volume of air traffic expected at the airport.

a. *Wind.* Appendix 1 provides information on wind data analysis for airport planning and design. Such an analysis considers the wind velocity and direction as related to the existing and forecasted operations during visual and instrument meteorological conditions. It may also consider wind by time of day.

b. *Airspace Availability.* Existing and planned instrument approach procedures, missed approach procedures, departure procedures, control zones, special use airspace, restricted airspace, and traffic patterns influence airport layouts and locations. Contact the FAA for assistance on airspace matters.

c. *Environmental Factors.* In developing runways to be compatible with the airport environs, conduct environmental studies which consider the impact of existing and proposed land use and noise on nearby residents, air and water quality, wildlife, and historical/archeological features.

d. *Obstructions to Air Navigation.* An obstruction survey should identify those objects which may affect airplane operations. Approaches free of obstructions are desirable and encouraged, but as a minimum, locate and orient runways to ensure that the

* * *

(c) When the thresholds are staggered and the approach is to the far threshold, the minimum 2,500-foot (762 m) separation requires an increase of 100 feet (30 m) for every 500 feet (152 m) of threshold stagger.

209. *RUNWAY TO PARALLEL TAXIWAY AND TAXILANE SEPARATION.*

a. *Standards.* Tables 2-1 and 2-2 present the runway centerline to parallel taxiway/taxilane centerline separation standard. This distance is such to satisfy the requirement that no part of an aircraft (tail tip, wing tip) on taxiway/taxilane centerline is within the runway safety area or penetrates the obstacle free zone (OFZ). The computer program cited in appendix 11 may be used to determine the increase to these separation distances for elevation.

b. *Recommendations.* To have room for the acute-angled exit taxiway, provide a runway centerline to parallel taxiway centerline of at least 400 feet (120 m) for Airplane Design Groups I and II, 500 feet (150 m) for Airplane Design Group III, and 600 feet (180 m) for Airplane Design Groups IV, V, and VI.

210. *BUILDING RESTRICTION LINE (BRL).* A BRL should be placed on an airport layout plan for identifying suitable building area locations on airports. The BRL should encompass the runway protection zones, the

runway object free area, the runway visibility zone (see paragraph 503), NAVAID critical areas, areas required for terminal instrument procedures, and airport traffic control tower clear line of sight.

211. *OBJECT CLEARING CRITERIA.* Safe and efficient operations at an airport require that certain areas on and near the airport be clear of objects or restricted to objects with a certain function, composition, and/or height. The object clearing criteria subdivides the 14 CFR Part 77, Subpart C, airspace and the object free area (OFA) ground area by type of objects tolerated within each subdivision. Aircraft are controlled by the aircraft operating rules and not by this criteria.

a. *Standards.* Object clearance requirements are as follows:

(1) *Object Free Area (OFA).* Object free areas require clearing of objects as specified in paragraph 307, Runway Object Free Area, and paragraph 404, Taxiway and Taxilane Object Free Area (OFA).

(2) *Runway and Taxiway Safety Areas.* Runway and taxiway safety areas require clearing of objects, except for objects that need to be located in the runway or taxiway safety area because of their function. Objects higher than 3 inches (7.6 cm) above grade should be constructed on low impact resistant supports (frangible mounted structures) of the lowest practical height with the frangible point no higher than 3 inches (7.6 cm) above grade. Other objects, such as manholes, should be constructed at grade. In no case should their height exceed 3 inches (7.6 cm) above grade. Underground fuel storage facilities should not be located within runway and taxiway safety areas (see AC 150/5230-4), Aircraft Fuel Storage, Handling, and

Dispensing on Airports). Tables 3-1, 3-2, 3-3, and 4-1 specify runway and taxiway safety area standard dimensions.

(3) *Obstacle Free Zone (OFZ).* Obstacle Free Zones require clearing of object penetrations, except for frangible visual NAVAIDs that need to be located in the OFZ because of their function. Paragraph 306 specifies OFZ standard dimensions.

(4) *Threshold.* The threshold obstacle clearance surfaces, defined in Appendix 2, paragraph 5, require clearing of object penetrations.

(5) *NAVAIDs.* Certain areas require clearing for the establishment and operation of NAVAIDs. These NAVAID critical areas are depicted in chapter 6.

(6) *14 CFR Part 77 Obstructions to Air Navigation.* Obstructions to air navigation must be removed unless an FAA aeronautical study, based on proposed operations, determined otherwise. To determine otherwise, the FAA must find no substantial adverse effect as defined in Order 7400.2, Procedures for Handling Airspace Matters, Chapter 7, Evaluating Aeronautical Effect, Section 1, General. The FAA, normally, limits aeronautical studies of existing objects to obstructions to air navigation which are not included in the criteria cited in paragraphs 211a(1) through (5).

(7) *Runway Protection Zone (RPZ).* The RPZ requires clearing of incompatible objects and activities as specified in paragraphs 212a(1)(a) and 212a(2).

(8) *General.* Other objects which require clearing are those which generally can have an adverse effect on the airport. These include objects in the inner part of the

approach area (coinciding with the RPZ) such as fuel handling and storage facilities, smoke and dust generating activities, misleading lights, and those which may create glare or attract wildlife.

b. *Recommendations.* Other objects which are desirable to clear, if practicable, are objects which do not have a substantial adverse effect on the airport but, if removed, will enhance operations. These include objects in the controlled activity area and obstructions to air navigation which are not covered in paragraph 211.a, especially those penetrating an approach surface. On a paved runway, the approach surface starts 200 feet (61 m) beyond the area usable for takeoff or landing, whichever is more demanding. On an unpaved runway, the approach surface starts at the end of the area usable for takeoff or landing.

212. *RUNWAY PROTECTION ZONE (RPZ).* The RPZ's function is to enhance the protection of people and property on the ground. This is achieved through airport owner control over RPZs. Such control includes clearing RPZ areas (and maintaining them clear) of incompatible objects and activities. Control is preferably exercised through the acquisition of sufficient property interest in the RPZ.

a. *Standards.*

(1) *RPZ Configuration/Location.* The RPZ is trapezoidal in shape and centered about the extended runway centerline. The controlled activity area and a portion of the Runway OFA are the two components of the RPZ (see figure 2-3). The RPZ dimension for a particular runway end is a function of the type of aircraft and approach visibility minimum associated with that runway end. Table 2-4 provides standard dimensions for RPZs.

Other than with a special application of declared distances, the RPZ begins 200 feet (60 m) beyond the end of the area usable for takeoff or landing. With a special application of declared distances, see Appendix 14, separate approach and departure RPZs are required for each runway end.

(a) *The Runway OFA.* Paragraph 307 contains the location, dimension, and clearing standards for the Runway OFA.

(b) *The Controlled Activity Area.* The controlled activity area is the portion of the RPZ beyond and to the sides of the Runway OFA.

(2) *Land Use.* In addition to the criteria specified in paragraph 211, the following land use criteria apply within the RPZ:

(a) While it is desirable to clear all objects from the RPZ, some uses are permitted, provided they do not attract wildlife, are outside of the Runway OFA, and do not interfere with navigational aids. Golf courses (but not club houses) and agricultural operations (other than forestry or livestock farms) are expressly permitted under this proviso. Automobile parking facilities, although discouraged, may be permitted, provided the parking facilities and any associated appurtenances, in addition to meeting all of the preceding conditions, are located outside of the object free area extension (as depicted in figure 2-3). Fuel storage facilities should not be located in the RPZ.

(b) Land uses prohibited from the RPZ are: residences and places of public assembly, (Churches, schools, hospitals, office buildings, shopping centers, and other uses with similar concentrations of persons typify

places of public assembly.) Fuel storage facilities should not be located in the RPZ.

b. *Recommendations.* Where it is determined to be impracticable for the airport owner to acquire and plan the land uses within the entire RPZ, the RPZ land use standards have recommendation status for that portion of the RPZ not controlled by the airport owner.

c. *FAA Studies of Objects and Activities in the Vicinity of Airports.* The FAA policy is to protect the public investment in the national airport system. To implement this policy, the FAA studies existing and proposed objects and activities, both off and on public-use airports, with respect to their effect upon the safe and efficient use of the airports and safety of persons and property on the ground. These objects need not be obstructions to air navigation, as defined in 14 CFR Part 77. As the result of a study, the FAA may issue an advisory recommendation in opposition to the presence of any off-airport object or activity in the vicinity of a public-use airport that conflicts with an airport planning or design standard or recommendation.

213. to 299. *RESERVED*

STATE OF CONNECTICUT
DEPARTMENT OF TRANSPORTATION

2800 BERLIN TURNPIKE, P.O. BOX 317546
NEWINGTON, CONNECTICUT 06131-7546

Phone: 860-594-2537

September 1, 1999

Mr. Timothy Mellon
P.O. Box 441
Lyme, CT 06371

Dear Mr. Mellon:

Subject: Goodspeed Airport and Seaplane Base
5010 Inspection

On August 11, 1999, I conducted the mandatory 5010 inspection of Goodspeed Airport and Seaplane Base. The airport's general appearance was good. The surrounding grass areas were mowed and the area was clean and well kept.

However, during the inspection, a number of items were noted that need attention to keep the airport in compliance with State regulations. Goodspeed Airport and Seaplane base is licensed as a commercial landing area, which is open for public use; therefore, it must meet the standards afforded to it. The following is a list of items that should be addressed.

Runway 14

- The primary surface area extends 200' from the end of the runway and ~~is~~ 250' wide (i.e. 125' each side of centerline). This area must be kept clear of all obstructions that are not fixed by function to a maximum height of 6"

at all times. As you are aware, it is important that the telephone pole fence be replaced with a frangible system.

- In the runway approach surfaces there are a number of obstructions with the most critical being some trees located 140 feet left of centerline at a distance of 440 feet from the runway end with a height of 56 feet above the runway surface. These trees should be removed as soon as possible since they are encroaching on the runway approach surface and penetrating the 7:1 Part 77 side slope. For further information, please refer to the enclosed plan sheet showing the airport layout illustrating the approximate location of the offending objects. Per FAA's Part 77, the minimum approach slope for this runway should be 20:1.

Runway 32

- The primary surface area extends 200' from the end of the runway and is 250' wide (i.e. 125' each side of centerline). This area must be kept clear of all obstructions that are not fixed by function to a maximum height of 6" at all times.

- In the runway approach surface there is a tree line that penetrates the Part 77 surface on the right side, center and left side. These trees should be removed as soon as possible to afford a much safer approach. These obstructions give Runway 23 an approximate slope of 7:1. For further information, please refer to the enclosed plan sheet showing the airport layout illustrating the approach

location of the offending objects. Per FAA's Part 77, the minimum approach slope for this runway should be 20:1.

I have enclosed the following information that I hope will be beneficial to you in understanding some of the guidelines that were used in doing the 5010 inspection and in evaluating the obstruction situation.

1. A drawing illustrating the 250' primary surface for utility runways with a visual approach at both ends that must be clear of all obstructions at all times.

2. A drawing illustrating the runway approach surface for a utility runway with a visual approach. This surface must also be kept clear of all obstructions.

3. A drawing which shows the methodology for measuring a 20:1 glide slope landing length which may be necessary if some of the obstructions are not removable.

4. Federal Aviation Administration Part 77, Objects Affecting Navigable Airspace, and number 77.25 Civil Airport Imaginary Surfaces.

5. A plan view of the airport which illustrates the approximate locations and heights of the obstructions.

6. Three sheets showing the measurements that were taken and the calculations that were done to establish the obstructions.

This office should be notified, in writing, within thirty (30) days to your receipt of this letter as to what action will be taken on the aforementioned items.

The State of Connecticut, Bureau of Aviation and Ports, is here to assist you in any way we can to keep this airport a viable part of the State's aviation system. We realize there are certain limitations in trying to operate this airport. If I can be of any additional assistance, please feel free to contact me.

Very truly yours,

/s/ Warren G. Stannard/ns
Warren G. Stannard
Trans. Supervising
Airport Engineer
Bureau of Aviation
and Ports

Enclosures

bcc: Kenneth J. Robert
Warren G. Stannard

(5)

No. 05-1088

Supreme Court, U.S.
FILED
MAR 27 2006
OFFICE OF THE CLERK

In The

Supreme Court Of The United States

GOODSPEED AIRPORT, LLC, ET AL.
Petitioners

v.

ARTHUR J. ROCQUE, JR., COMMISSIONER
OF ENVIRONMENTAL PROTECTION
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Should the United States Supreme Court exercise its certiorari jurisdiction where the Petitioners raise an issue of federal preemption of state and local land use law which the Connecticut Supreme Court concluded it need not reach and thus did not rule on, because of a concession made by the petitioners at oral argument before that Court?

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COUNTER-STATEMENT OF THE CASE

The respondent, Connecticut Commissioner of Environmental Protection ("commissioner"), brought suit against the petitioners, Timothy Mellon, and Goodspeed Airport, LLC for the unreasonable destruction or impairment of wetlands, watercourses and the floodplain forest, pursuant to Conn. Gen. Stat. § 22a-16, for the petitioners' clear cutting of trees, bushes and woody vegetation on 2.5 acres of land adjacent to their airport, which land was owned by the East Haddam Land Trust and The Nature Conservancy ("the land trust parties").[1] *Rocque v. Mellon*, 275 Conn. 161, 163-65, 881 A.2d 972 (2005), Petitioners' Appendix B, 57a – 59a. This clear cutting was done by the petitioners without the permission of the land trust parties. *Mellon*, 275 Conn. at 165, Pet. App., 60a. The petitioners claimed that the trees posed a danger to aircraft landing at and taking off from the airport. *Id.*

The petitioners raised the special defense that the commissioner's action was preempted by federal aviation law. *Mellon*, 275 Conn. at 166, Pet. App., 60a. The trial court rejected the petitioners' preemption claim, entering judgment for the commissioner on his complaint as to the harm to the floodplain forest. *Id.*, Pet. App., 61a.

In the companion case, *Ventres v. Goodspeed Airport, LLC*, 275 Conn. 105, 881 A.2d 937 (2005), the

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[1] The Connecticut Environmental Protection Act ("CEPA"), Conn. Gen. Stat. § 22a-16 *et seq.*, provides for declaratory, equitable and supplementary relief for the protection of the public trust in the air, water, and natural resources of the state from, inter alia, unreasonable destruction or impairment.

land trust parties cross-appealed the trial court's finding of a limited prescriptive easement on their properties running in favor of the petitioners. *Ventres*, 275 Conn. at 114, Pet. App. A, 7a. The trial court ruled that the petitioners had acquired a prescriptive easement "to go onto the 2.5 acre area, on occasion, and trim or cut trees which interfered with the safety of air traffic taking off or landing on the runway." *Ventres*, 275 Conn. at 119, n. 19, Pet. App. A, 12a, n.19; *see also* Pet. App. C, 90a. The trial court further described this prescriptive easement as including "the periodic trimming and severing of a few or even several trees at a time." Pet. App. C, 91a.

The trial court concluded that the clear cutting exceeded the scope of the prescriptive easement and that the petitioners were liable to the land trust parties for trespass. *Id.* On appeal, the petitioners, however, did not challenge the trial court's determination that their clear cutting exceeded the scope of the prescriptive easement. *Ventres*, 275 Conn. at 131, 132, Pet. App. A, 25a, 27a. The Connecticut Supreme Court concluded "that the trial court properly determined that the airport defendants [petitioners] had no right under the prescriptive easement to clear-cut the land trust defendants' property." *Id.* at 119, Pet. App. A, 13a.

At oral argument before the Connecticut Supreme Court, the petitioners' counsel contended: "I cannot remove the trees. Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA [Federal Aviation Administration] regulations don't permit me to do it. The DOT [Connecticut Department of Transportation] can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it. If I do have the property right, which is the facts in this case as determined by the

Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland." Respondent's App., Transcript of the oral argument before the Connecticut Supreme Court on April 14, 2005, Resp. App., 8-A to 9-A.

In response to the petitioners' counsel's contention, Justice Borden replied: "Well, I understand your argument. It just seems to me a rather novel use of federal preemption. I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing. I thought pre-emption is pre-emption and it doesn't matter whether you—well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay." Resp. App., 9-A. Based on the questions of the Court and the answers of the petitioners' counsel thereto, Resp. App., 3-A to 9-A, the Connecticut Supreme Court held as follows: "At oral argument before this court, however, they [the petitioners] clarified that they claim only that they had a right to remove obstructions within the navigable airspace over the land trust defendants' properties because they had acquired a prescriptive right to enter the properties for that purpose under state property law. They conceded that, in the absence of that prescriptive property right, federal law would not confer any such right." Pet. App. A, 11a.

Thus, based on state property law, the Connecticut Supreme Court concluded that "the trial court properly determined that the airport defendants had a prescriptive easement to maintain an approach slope over the land trust defendants' property, but that they exceeded the scope of the easement by clear-cutting the land. We further conclude that, because the airport defendants [the petitioners] had no right under state property law to clear-

cut the land, they had no such right under federal law and *accordingly, we need not reach their claim that federal law preempts state and local land use law.*" *Ventres*, 275 Conn. at 114-15, Pet. App., 8a. (Emphasis added.)

SUMMARY OF THE ARGUMENT

Because the Connecticut Supreme Court has not rendered a decision on the petitioners' claim of federal preemption based on the petitioners' concession made at oral argument before the Connecticut Supreme Court, there is no basis for the United States Supreme Court to review the petitioner's claim under its certiorari jurisdiction.

ARGUMENT

There is no ruling by the Connecticut Supreme Court on the petitioners' claim of federal preemption. *See Ventres*, 275 Conn. at 115, Pet. App. A, 8a ("[A]ccordingly we need not reach their [the petitioners'] claim that federal law preempts state and local land use law.") Pursuant to 28 U.S.C. § 1257 (a), the United States Supreme Court may exercise its certiorari authority to review "final judgments or decrees rendered by the highest court of a State in which a decision could be had." In construing 28 U.S.C. § 1257, the Court has said "it is also the settled practice of this Court, in the exercise of its appellate jurisdiction that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below." *Illinois v. Gates*, 462 U.S. 213, 218-20, 76 L.Ed.2d 527, 103 S. Ct. 2317 (1983), quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

The petitioners bear the heavy burden of demonstrating that the issue of federal preemption was

properly presented to the Connecticut Supreme Court. "When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 95 L. Ed. 2d 474, 107 S. Ct. 1940 (1987), and the aggrieved party bears the burden of defeating this assumption, *ibid.*, by demonstrating that the state court had 'a fair opportunity to address the federal question that is sought to be presented here,' *Webb v. Webb*, 451 U.S. 493, 501, 68 L. Ed. 2d 392, 101 S. Ct. 1889 (1981)." *Adams v. Robertson*, 520 U.S. 83, 86-87, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997).

The petitioners cannot sustain that burden. The trial court ruled that the state civil actions against the petitioners were not preempted by federal aviation law. Pet. App. C, 71a – 74a. Thereafter, the petitioners appealed to the Connecticut Supreme Court claiming, *inter alia*, that the trial court improperly determined that federal aviation law does not preempt state and local wetlands law regulation. *Ventres*, 275 Conn. at 114, Pet. App. A, 7a. The Connecticut Supreme Court, however, had no need to reach the federal preemption issue based on the petitioners' concession at oral argument. Upon close questioning by that court, the petitioners conceded that federal law does not confer a legal right upon them to enter onto another's private property and clear cut his trees. Resp. App., 11-A to 14-A. The petitioners reinforced their concession at oral argument by stating that they would have had to secure that state property right in order to clear cut the trees. Resp. App., 12-A. Although the petitioners asserted to the Connecticut Supreme Court that the trial court had made a determination that the petitioners had a state prescriptive easement to clear cut the 2.5 acres of trees, the Connecticut Supreme Court disagreed, holding "that the trial court properly determined that the airport defendants [petitioners] had no right under the prescriptive easement to clear-cut

the land trust defendants' property." *Ventres*, 275 Conn. at 119, Pet. App. A, 13a.

The petitioners did not challenge the trial court's determination of the limits of their prescriptive easement, in order to preserve their claim that neither the state's inland wetlands laws nor CEPA applied to their conduct. *Id.* at 131, Pet. App. A, 25a. Thus, with nothing other than state law claims actually before it, the Connecticut Supreme Court rendered a decision on the petitioners' appeal without needing to reach the petitioners' federal preemption issue. *Id.* at 115, Pet. App. A., 8a. The petitioners themselves conceded that federal law did not grant them the right to enter onto another's property, and their discussion of conflicting legal authority and the reach of federal preemption under the regulatory scheme that they have described necessarily founders upon this point. Since the petitioners did not possess the state property law right to enter onto the land trust properties to clear cut 2.5 acres of forest, there was no need for the Connecticut Supreme Court to reach the preemption issue as the petitioners had framed it to that court – as it would not have changed the outcome of this case.

Thus, there is no Connecticut Supreme Court decision on the federal preemption issue that the petitioners wish to have the United States Supreme Court review. There is a lower state court ruling on federal preemption. In Connecticut, however, "(t)rial court cases do not establish binding precedent." *McDonald v. Rowe*, 43 Conn. App. 39, 43, 682 A.2d 542 (1996).

Absent a ruling from the Connecticut Supreme Court on the issue of federal preemption, this Court should decline to review the petitioner's claim under its certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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COMMISSIONER OF THE
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March, 2006

No. 05-1088

In The

Supreme Court Of The United States

GOODSPEED AIRPORT, LLC, ET AL.
Petitioners

v.

ARTHUR J. ROCQUE, JR., COMMISSIONER
OF ENVIRONMENTAL PROTECTION
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

APPENDIX

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SC17280 TTD	:	SUPREME COURT
JAMES VENTRES, ET AL.	:	STATE OF CONNECTICUT
v.	:	IN HARTFORD
GOODSPEED AIRPORT, LLC, ET AL.	:	APRIL 14, 2005

BEFORE:

CHIEF JUSTICE WILLIAM SULLIVAN
JUSTICE DAVID M. BORDEN
JUSTICE FLEMMING L. NORCOTT, JR.
JUSTICE RICHARD N. PALMER
JUSTICE PETER T. ZARELLA

APPEARANCES:

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FOR THE APPELLEES:
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DAVID H. WRINN, ASST. ATTY. GEN.
MIKE DONNELLY, ESQ.

Joy E. Franklin
Court Monitor

* * *

There was testimony in the past about planes hitting trees but not specifically with respect to these particular trees. These trees were much taller than the trees in the past.

JUSTICE BORDEN: I guess to make it more narrow, was there any evidence that this clear cutting of the entire piece was done in response to pilot complaints?

MR. BASHAW: I don't believe that there was testimony to that effect.

JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to do that are simply pre-empted.

MR. BASHAW: That's correct, Your Honor. That--

JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: Well, no, not true there, Your Honor.

What our position is, Your Honor, that you do not need an order from the DOT to remove the trees. You do not need a directive from them.

If the trees protrude into the federal glide slope or if they are otherwise located in a runway protection zone and you otherwise have the property right to remove those trees, then you don't have to go get permission from the DOT. You do not need permission from the FAA to remove those trees. You can do it because you're trying to maintain air safety.

Now, you do need--

JUSTICE BORDEN: What if there were--instead of trees, what if someone had built--I mean, I know this is a land trust so it wasn't, but let's suppose it's not a land trust.

There's a building there, a house, but there are no complaints by pilots that the height of the house is impeding their take-offs or their landings.

Neither DOT nor FAA has said, We've got to do something about that house. The house is 20 or 30 feet high, whatever it is.

I take it your argument would be that because of federal pre-emption, your client could go out and bulldoze the house and he couldn't be--

MR. BASHAW: Actually, no, Your Honor

JUSTICE BORDEN: No?

MR. BASHAW: I want to be clear.

If that was my client's house--

JUSTICE BORDEN: No, no, no, no, this is a house on someone else's--

MR. BASHAW: Okay. If this is somebody else's house?

JUSTICE BORDEN: --this is the house on that land.

MR. BASHAW: No, no, I'm not making any claim, Your Honor, that this gives you the right to go onto somebody else's property, to go and cut down and remove their trees.

There's a case, I think it was City of Westchester--it's a Connecticut decision--that dealt with abrogation

easements.

I'm not making a claim that the regulations give you some sort of an easement, a right to go onto somebody else's property, but in this case, in this case that we had here, we had the property right to go onto that property and clear the trees.

What I'm saying is we had that property right but, yet, the appellees are saying, You still needed to get permission from the Inland-Wetland Commission to remove those trees, and we're going to punish you under CEPA for removing those trees.

Our position is when you have the property right to go do the work, then you cannot have local interference or state interference with that activity.

That's our position, Your Honor.

JUSTICE BORDEN: So your argument for federal pre-emption, I'm not sure I understand its relation to the easement.

Your clients claimed a prescriptive easement. I mean, if--

MR. BASHAW: And the Trial Court so found, but, yes--

JUSTICE BORDEN: But that's challenged.

MR. BASHAW: That's correct.

JUSTICE BORDEN: I mean, it's not like they had a deed, you know, an easement by deed which said you have the right to do this.

MR. BASHAW: That's right.

JUSTICE BORDEN: They went and they did it and the Trial Court agreed with the. The other side challenges that in their cross appeal--

MR. BASHAW: Correct.

JUSTICE BORDEN: --but I'm still trying to--that's a matter of state property law.

MR. BASHAW: I agree, Your Honor.

JUSTICE BORDEN: How does that affect, one way or the other, whether you're pre-empted?

It seems to me if your pre-emption argument is correct, it's correct irrespective of whether you had an easement to do that. Isn't that so?

MR. BASHAW: Well, let me give you another example, Your Honor.

JUSTICE BORDEN: Well, no, I'm trying to--

MR. BASHAW: Yes--

JUSTICE BORDEN: --I'm trying to under--you said to me, well, you couldn't just go bulldoze somebody's house--well, your time is up but I'll have to take a little bit of it--you couldn't go bulldoze somebody's house because in this case you had an easement to cut trees.

MR. BASHAW: Right.

JUSTICE BORDEN: But I don't understand how--I thought if you have federal pre-emption because this is airspace, under federal pre-emption local laws are pre-empted, so even if this had happened in the 14th year instead of the--well, in the 16th year so you didn't have an

easement by prescription--your federal pre-emption argument would be the same, wouldn't it?

MR. BASHAW: Well, again, Your Honor, I think still pre-emption--the whole point of pre-emption is if I have the right to remove the trees.

The airport itself, the airport property itself which is located in a flood plain, all right, the Inland-Wetlands position is I have to go and get their permission to remove the trees that are on my own property.

I could get punished under CEPA, my client could get punished under CEPA for removing those trees on his own property. That's what's pre-empted. You can't let local laws affect the airport's ability to maintain clear space around its airport when it has the property right to do.

I do not claim--

JUSTICE BORDEN: So, then, are you saying that your pre-emption argument rests on the validity of the Trial Court's finding of the prescriptive easement?

MR. BASHAW: Certainly, yeah, it doesn't give me the right. If there's no prescriptive easement, Your Honor--

JUSTICE BORDEN: Let's suppose that this had happen--let's suppose that the Trial court had rejected your easement. They said, Yes, you did it but it wasn't continuous or it wasn't open and notorious. You failed in some proof of your prescriptive easement cause of action.

MR. BASHAW: Correct. But it--

JUSTICE BORDEN: So you didn't, The Trial Court

rejected your claim of an easement. Would you still have a pre-emption argument--

MR. BASHAW: Not with re--

JUSTICE BORDEN: --on the claim of the Inland-Wetlands Commission?

MR. BASHAW: Not with respect to the East Haddam Land Trust and the Nature Conservancy land.

I would, however, still have the right because, remember, the cease and desist order that was issued to the airport prohibits them from removing vegetation on their own land.

JUSTICE BORDEN: I'm--

MR. BASHAW: But, yes, Your Honor, the answer to your--

JUSTICE BORDEN: --let's put aside your own land.

The other party's land--

MR. BASHAW: Yeah, I –

JUSTICE BORDEN: --are you saying to me now, because this is something I never understood, you're saying that your pre-emption argument is premised on your easement.

MR. BASHAW: I cannot remove the trees. Even if I have pre-emption, I cannot go onto somebody else's land and remove the trees. The FAA regulations don't permit me to do it. The DOT can come out and say those trees are a problem, I don't have the right to, but if I have not otherwise secured the property rights to go onto that land and do the work, I can't do it.

If I do have the property right, which is the facts in this case as determined by the Trial Court, then a local agency or a state agency cannot, then, step into the fray and say, No, you're prohibited from doing that because, in this case, the trees happen to be located in a wetland.

JUSTICE BORDEN: Well, I understand your argument. It just seems to me a rather novel use of federal pre-emption.

I've never heard of saying, well, the federal law is supreme and pre-empts the state law only if the person claiming it has some state law right to do what he's doing.

I thought pre-emption is pre-emption and it doesn't matter whether you--well, now I understand your argument but I hadn't understood you to make that argument before, Mr. Bashaw. Okay.

MR. BASHAW: I think I'll just, since I'm over my time--

JUSTICE SULLIVAN: You've got 21 minutes left.

MR. BASHAW: Good. I'll go into my rebuttal time.

The other portion of pre-emption is conflict pre-emption. I guess I probably won't rehash. The same argument applies to that.

You cannot have exclusive sovereignty of the airspace and you cannot effect the routes of aircraft coming into an airport if, and in this case what will happen if the trees will grow into the glide slope or grow into the RPZ and may grow onto the airport's own land, and they're prohibited

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Supreme Court, U.S.
FILED
APR 5 - 2006
OFFICE OF THE CLERK

No. 05-1082

In the Supreme Court of the United States

GOODSPEED AIRPORT, LLC, ET AL., PETITIONERS

v.

EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION, ET AL., RESPONDENTS

GOODSPEED AIRPORT, LLC, ET AL., PETITIONERS

v.

ARTHUR J. ROCQUE, JR., COMMISSIONER OF ENVIRONMENTAL PROTECTION, RESPONDENT

On Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute that the decisions below bar petitioners from clearing obstructions to air navigation—as defined by *federal* law—without first obtaining permission from *local* land use officials. Unable to explain why local land use regulators should have the final say on matters of safety involving "airspace of the United States," 49 U.S.C. § 40103(a), respondents attempt to change the subject, suggesting that this Court lacks *jurisdiction* because petitioners conceded at oral argument below that there is no preemption here.

As explained in the petition (at 12 n.4), the "concession" on which respondents rely, however, concerned preemption of *the common law of trespass*, not of *local permitting requirements*—which are the subject of the petition. The oral argument transcript (read in context), the briefs, and the rulings below all confirm that our position here was also pressed below, and that the Connecticut Supreme Court wrongly concluded that our concession concerning trespass law foreclosed our preemption defense to the application of local permitting mandates. Indeed, the order under review extends to the removal of obstructions located on petitioners' *own* property—where trespass is not an issue.

Once the fallacy of respondents' jurisdictional argument is revealed, it is evident that the petition should be granted. Respondents do not deny the importance of the question presented to the safety of 46 million flights annually. Pet. 14-19. They ignore our showing that the decisions below are at odds with the United States' position that preemption under the Federal Aviation Act is so complete as to support *removal jurisdiction*. They also ignore our showing that subjecting to local permitting rules airports' decisions to remove objects that obstruct takeoffs or landings would conflict with Congress's choice, for safety reasons, to place such decisions beyond local control. Pet. 25-30. Indeed, one searches respondents' briefs in vain for *any* reference to the

Federal Aviation Act or *any* attempt to reconcile the decisions below with the federal government's "exclusive sovereignty of airspace of the United States," including "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. §§ 40103(a), 40102(a)(30).

Although respondents deny the conflict between the decisions below and the rulings of the Ninth and Second Circuits, the decisions they cite—which admittedly reject the Ninth Circuit's view—actually confirm the breadth of the conflict on this issue of federal law. The petition should be granted to resolve this conflict and to vindicate Congress's overriding concern for air safety nationwide.

I. This Court Has Jurisdiction.

Relying upon an asserted "waiver" at the oral argument before the court below, respondents' principal answer to the petition—and the only response of Commissioner Rocque—is the assertion that the Court lacks jurisdiction to hear this case. Rocque Opp. 4-6; Ventres Opp. 10-17; Land Trust Opp. 2-3. Respondents acknowledge, however, that any jurisdictional requirements of 28 U.S.C. § 1257(a) are satisfied if the federal claim "was either addressed by, or properly presented to, the state court that rendered the decision" below. *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (*per curiam*) (emphasis added). See Ventres Opp. 11. Both of these alternative requirements are satisfied here.[1]

1. Read as a whole, the oral argument transcript shows that petitioners' counsel pressed preemption of the state regulatory claims as the chief basis for reversing the trial court, and that he conceded only that the common-law trespass claim was not preempted. Counsel stated that "federal pre-emption" is "the strongest argument" and that

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[1] It is not even clear that these requirements are *jurisdictional*. See *Adams*, 520 U.S. at 90 (explaining that it is unsettled "whether [the] requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential").

it is "dispositive of *almost all* the claims that [were] before the Court * * * with *perhaps the exception of the argument over the prescriptive easement.*" Ventres App. 7 (emphasis added). He continued:

> The two federal laws at issue in this case are Title 49, Section [40103(a)] of the Federal Aviation Act, which says very succinctly: The United States government has exclusive sovereignty of airspace of the United States; exclusive sovereignty. * * * The other federal law at issue in this case is Section [41713(b)(1)] which is under the Airline Deregulation Act. * * *
>
> So, therefore, the issue in this case, succinctly, is: Do these two federal laws, under the Federal Aviation Act and the Airline Deregulation Act, preempt and prohibit the State of Connecticut and the Inland-Wetlands Commission from *enforcing the Inland-Wetlands Act against the airport parties and punish them under CEPA for the removal of the trees*?

Ventres App. 7-8 (emphasis added); see also *id.* at App. 9-14. From the outset, then, counsel clearly distinguished issues involving petitioners' easement from issues involving preemption of local regulators' permitting requirements. See also Pet. 12 n. 4.

This distinction is vital to understanding the concession upon which respondents rely. In response to a question testing the scope of petitioners' preemption defense, petitioners' counsel stated that federal preemption did not displace the common law of *trespass*:

> JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to that are simply pre-empted.
>
> MR. BASHAW: That's correct, Your Honor. That—
>
> JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: Well, no, not true there, Your Honor.

Ventres App. 24. Counsel made similar statements in response to other questions about the airport's right to enter neighboring properties to remove obstructions to air navigation. See Ventres App. 26, 29-30.

Notably, the concession appears in the context of a discussion about trespass—the airport's rights vis-à-vis the neighboring landowners. Viewed in context, the concession does not speak to the airport's rights vis-à-vis state and local regulators. The two sets of issues are distinct, and the court below could not avoid the preemption issue with respect to the state and local *regulations*—the question presented in the petition—by relying on a concession made in response to a series of questions implicating the law of *trespass*.

That petitioners vigorously contended that federal law preempts state and local permitting rules is further confirmed by a review of the briefs below. Those briefs repeatedly urged that the state and local *regulations* at issue are preempted by the Federal Aviation and Airline Deregulation Acts, but nowhere suggested that trespass law is preempted. See Brief of Defendants-Appellants in *Ventres* v. *Mellon* (A.C. 25498), ii (framing the issue as whether federal law "preempt[s] the Plaintiffs' regulation of the removal of vegetation located within the FAA approach surface and the RPZ for the Airport's runway under the Connecticut Inland Wetlands and Watercourses Act"); see also *id.* at 12-27;[2] Reply Brief of Defendants-Appellants in

---

[2] See *id.* at 15 ("The trial court erroneously determined that the local IWWC can impose local permitting obligations on persons who wish to remove obstructions within the navigable airspace"); *id.* at 19 ("the FAA preempts all local and state regulation of approach zones or clear zones"); *id.* at 21 ("[r]equiring a wetlands permit to eliminate trees in the approach surfaces or RPZ" is preempted); *id.* at 25 ("a temporary and permanent injunction against any further tree cutting" and "the obligations imposed by

Ventres v. *Mellon* (S.C. 17280), 1 (framing the issue as "whether local regulation and enforcement of the cutting of trees in a wetland is preempted"); *id.* at 5-13. Petitioners' position has remained constant throughout this litigation.

2. Nor is this a case in which the state supreme court was silent on the federal issue, raising a presumption that the issue was not adequately presented. See *Adams*, 520 U.S. at 86-87. To the contrary, the court in *Ventres* acknowledged petitioners' preemption defense and explained why, in its view, petitioners' concession that state trespass law was not preempted meant there is no preemption *at all*: "[B]ecause the airport defendants had no right under state property law to clear-cut the land, they had no such right under federal law and, accordingly, we need not reach their claim that federal law preempts state and local land use law." Pet. App. 8a; see also *id.* at 7a-11a, 26a. That the court misapprehended the implications of the distinction between preemption of state regulatory law and of state common law does not deprive this Court of jurisdiction. Cf. *Webb* v. *Webb*, 451 U.S. 493, 495 (1981) (dismissing a writ for lack of jurisdiction where "nowhere in the opinion of the [state supreme court] is any federal question mentioned, let alone expressly passed upon").

In sum, the preemption issue that is the subject of the petition was "properly presented to" and "addressed by" the court below, and there is "an adequate factual and legal record" on which to decide it. *Adams*, 520 U.S. at 90. The assertion that this Court lacks jurisdiction is baseless.

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the IWWA (e.g., permitting) * * * are inconsistent with the obligations mandated by the Federal Aviation Act"); *id.* at 26 ("Each statute seeks a means through regulation or enforcement to restrict or punish activity that is endorsed and supported by Congress under the Federal Aviation Act").

II. The Commission's Order Conflicts With Federal Law.

Respondents' other stated reasons for denying the petition are also without merit. Their failure even to *cite* the Federal Aviation Act is especially telling. As we noted in the petition (at 26-28), "[t]he United States Government has exclusive sovereignty of airspace of the United States," and this airspace includes "airspace needed to ensure safety in the takeoff and landing of aircraft." 49 U.S.C. §§ 40103(a), 40102(a)(30). In granting the federal government "exclusive sovereignty" over the "airspace needed to ensure safety in the takeoff and landing of aircraft," the Act bars States from applying land use laws to impede airports' ability to clear trees from approach surfaces or runway protection zones.

1. Respondents seek to avoid the force of this language by focusing on certain FAA regulations and suggesting that those regulations contain mere "recommendations." Land Trust Opp. 5; Ventres Opp. 21-22. But the very authority that respondents cite for this claim acknowledges that the "[s]afe and efficient use of airspace *requires* that areas under these imaginary surfaces be kept clear of obstacles." *Flowers Mill Assoc.* v. *United States*, 23 Cl. Ct. 182, 184 (1991) (emphasis added). And respondents do not deny that, at a minimum, application of CEPA and the Commission's regulations here frustrates the "full purposes and objectives of Congress" in adopting the Federal Aviation Act. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941).

Moreover, even if FAA Advisory Circular No. 150/5300-13, § 211a(6) were not binding—and when an FAA rule says that "[o]bstructions to air navigation *must* be removed," we think an airport would ignore this directive at its peril—that would be irrelevant in light of the text of the Act. Given the statute's recognition of exclusive federal authority in the airspace, applications of state land use rules that impede the removal of trees or other obstructions to air navigation are preempted by the Act *without regard to FAA regulations on the subject*. The same is true of the Airline Deregulation Act,

which preempts any application of state or local regulations that affect the "route" of an air carrier. Respondents make no answer to these arguments.

2. Respondents also attempt to deny the existence of a conflict on the ground that, during the period from 1978 to 1999, when Mellon purchased the property, "the Airport had never been shut down for failure to maintain the glide path set forth" in the FAA's Part 77 regulations, despite its having a "non-conforming approach slope, a displaced threshold, or both," during 11 inspections. Land Trust Opp. 5.

The fact that the airport was not shut down prior to 1999 would come as little comfort to the victims of the airport's 1991 plane crash. See Pet. 7. Moreover, the evidence shows that a displaced threshold or steeper approach poses serious safety risks for a runway of this length, and that such risks are magnified when surface or weather conditions are less than ideal. See Pet. 27 n.4; *Flowers Mill Assoc.*, 23 Cl. Ct. at 185 ("the additional loss of landing runway is considered [to be substantially adverse] to aircraft operations" (alteration in original)). Contrary to respondents' suggestion, federal air safety regulations are not a dead letter to be ignored until someone threatens to close the airport. And the absence of such a threat does not undermine our showing that the Commission's order conflicts with federal law.

III. Respondents' Arguments Confirm That There Is A Deep And Mature Conflict On The Issue Presented, And That The Decisions Below Conflict With The Position Of The United States In Prior Cases.

Respondents' arguments also fail to undermine our showing that the decisions below conflict with decisions of at least two federal courts of appeals, and with the long-standing position of the United States in other cases.

1. As explained in the petition (at 19-23), the decisions below conflict with *Burbank-Glendale-Pasadena Airport*

Authority v. *City of Los Angeles*, 979 F.2d 1338, 1340-1341 (9th Cir. 1992), and *United States* v. *City of New Haven*, 496 F.2d 452 (2d Cir. 1974), which respectively held that airport runways and clear zones are "part of the navigable airspace" and subject to "exclusive" federal control. *New Haven*, 496 F.2d at 454; see *Burbank-Glendale*, 979 F.2d at 1341. Both of these decisions make clear that, contrary to the decisions below, state land use rules may not be applied to interfere with the clearance of approach surfaces or runway protection zones.

Respondents attempt to downplay this conflict by arguing that other courts have declined to follow the Ninth Circuit's or Second Circuit's reasoning. Ventres Opp. 24-25 (collecting five cases). For example, they cite one decision stating that "this Court joins others that have declined to follow [*Burbank-Glendale*]," and another rejecting the Ninth Circuit's "broader" view of the Federal Aviation Act. *Id.* at 24 (citations omitted). But the fact that other courts may have rejected the views of the Ninth or Second Circuit only *confirms* the extent of the conflict among the lower courts on the scope of preemption under the Federal Aviation Act.

Respondents also attempt to minimize the conflict on the ground that *New Haven* and *Burbank-Glendale* involved "property *owned by the airport*" rather than neighboring properties. Ventres Opp. 23; accord Land Trust Opp. 4. This argument fails for two reasons.

First, the validity of the city's ownership of the "clear zone" was vigorously disputed in *New Haven*—indeed, the Connecticut courts had ruled that the city's purchase of the land was invalid—but the Second Circuit expressly rejected the view that this affected the scope of federal preemption. As the court explained: "the legality under state law of New Haven's acquisition of the clear zone area is entirely separate from the question of the power of the state court to enjoin airport operations, whose regulation Congress has entirely preempted." 496 F.2d at 454. Thus, despite a state

court decision invalidating New Haven's purchase of the "clear zone," the Second Circuit held that the State's regulation of that clear zone "conflicted squarely with the regulation of navigable airspace which Congress has reserved for exclusive federal control." *Ibid.*

Moreover, although *Burbank-Glendale* involved property owned by the airport, nothing in the Ninth Circuit's opinion suggests that the identity of the landowner is relevant to the scope of preemption under the Federal Aviation Act. To the contrary, the court held that preemption extends to an airport's "surrounding airspace." 979 F.2d at 1341. Thus, as both the Second and Ninth Circuits recognize, but the court below (and various others) do not, the question that matters is whether the property at issue is part of the "airspace of the United States." 49 U.S.C. § 40103(a). If it is, then federal control is supreme and exclusive.

Second, respondents' argument ignores the scope of the trial court's cease-and-desist order and their own position below. The Commission sought and obtained an order from the trial court that prohibits petitioners from engaging in tree-removal activities *both* on the neighboring property *and on airport property.* See Pet. App. 93a-94a; Commission App. A28. The court below affirmed that order in its entirety, based on the Commission's position that permits are required to remove trees from any wetlands, no matter who owns them. The Commission cannot distinguish *City of New Haven* and *Burbank-Glendale* on the ground that they involve *airport* property while at the same time ordering petitioners to refrain from cutting trees on their own airport property.

2. The petition (at 23-25) also shows that the decisions below are at odds with the United States' position that preemption of the airspace is so complete as to support *removal jurisdiction.* See Brief for *Amicus Curiae* The United States of America, in *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). Rocque and the Land Trust ignore this point. The Commission dismisses it in a footnote (at 24

n.8), asserting that *Vorhees* "involved only the effort of a neighboring property owner to assert state law claims to control the airport's use of its own property."

The Commission's assertion is false: the neighboring property owner in *Vorhees* also relied on state law to prevent the airport from using "the airspace superadjacent to his lands." U.S. Br. 11. If such airspace was the airport's "own property" in *Vorhees*, then the approach surface and clear zone are similarly the airport's "own property" here.

More importantly, however, the Commission ignores the *substance* of the United States' position—that "States may not manage the airspace" because federal authorities have "exclusive sovereignty over navigable airspace," and that state regulation "would seriously interfere with public air travel and undermine the exclusively federal regulatory scheme." *Id.* at 6, 10, 12. Quite apart from the facts of *Vorhees*, this position confirms that the decisions below are out of step with the requirements of federal law.

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The exclusive federal interest in regulating the airspace—an interest articulated by Congress in legislation and defended by the United States in litigation—is necessary to ensure the safety of air travel nationwide. When state and local regulations stand in the way of an airport's compliance with federal law, the threat to air safety is as significant as the offense to federal authority. Respondents have offered no reason to ignore this threat to air safety, the plain language of the Federal Aviation Act, the position of the United States, or the mature conflict among state and federal courts on the scope of preemption in this context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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